(14,552.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 113.

THE NATIONAL BANK OF RONDOUT, NEW YORK, APPELLANT,

vs.

DAVID R. SMITH, IN HIS OWN RIGHT AND AS SURVIVING COPARTNER OF D. R. SMITH & CO., ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

INDEX.

	Original	Print.
Caption (omitted in printing)	1	—
Bill of complaint	2	1
Exhibit A—Marshal's deed to McGahan, September 7, 1885	13	7
Subpœna (omitted in printing)	18	—
Marshal's return (" ")	19	—
Appearance for defendants (" ")	21	—
Answer of M. Brown, Sons & Co. (" ")	21	—
Answer of Thomas R. McGahan (" ")	26	—
Answer of D. R. Smith and E. P. Smith (" ")	31	—
Demurrer of Daniel C. Steiling	34	10
Order granting leave to file replication. (omitted in printing)	36	—
Replication to answer of D. R. Smith and E. P. Smith (omitted in printing)	37	—
Replication to answer of Thomas R. McGahan (omitted in printing)	39	—

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 18, 1894.

	Original	Print.
Replication to answer of M. Brown, Sons & Co. (omitted in printing)	41	—
Order sustaining demurrer of Stelling	43	11
Order allowing appeal	44	12
Bond on appeal	45	12
Citation	47	13
Proof of service of citation	48	14
Clerk's certificate	49	14
Statement of errors and designation of parts of record to be printed	50	15

* * * * * * *

1 & 2 *Bill.*

THE UNITED STATES OF AMERICA, *Fourth Circuit, District of South Carolina.* } In Equity.

THE NATIONAL BANK OF RONDOUT, Rondout, New York, a National Banking Association Located in the State of New York, Complainant,

vs.

DAVID R. SMITH, in His Own Right and as Surviving Copartner of D. R. Smith & Co., a Citizen of the State of South Carolina; Mrs. E. P. Smith, Wife of D. R. Smith, a Citizen of the State of South Carolina; Edmund T. Krenston, Percy Lauderdale, T. Wister Brown, Junior, and Moses Brown, Copartners in Trade under the Firm Name of M. Brown, Sons and Company, Citizens of the State of Pennsylvania; Daniel C. Stelling, a Citizen of Georgia, and Thomas R. McGah-n, a Citizen of the State of South Carolina, Defendants.

To the honorable the judges of the circuit court of the United States for said circuit and for the district of South Carolina:

Humbly complaining, showeth unto your honors your orator, The National Bank of Rondout, of Rondout, New York:

First. That it is — banking corporation duly organized under and empowered by the laws of the United States as a national banking association; that its place of business is Rondout, in the State of New York, and that it is a citizen of said State; that the defendant David R. Smith and Mrs. E. P. Smith, his wife, and Thomas R. McGahan are citizens of the State of South Carolina; that the defendants Edmund T. Kenston, Percy Lauderdale, T. Wister Brown, Junior, and Moses Brown are citizens of the State of Pennsylvania, and that defendant Daniel C. Stelling is a citizen of the State of Georgia.

3 Second. That on the fifteenth day of December, A. D. 1887, your orator recovered in this court against the above-named D. R. Smith, as surviving copartner of the firm of D. R. Smith & Company, a judgement for the sum of thirteen thousand eight hundred and forty-four $\frac{74}{100}$ dollars and costs of suit, and is entitled to recover against the said D. R. Smith as surviving copartner of D. R. Smith & Company and individually, and to be paid out of the property of said firm and out of the individual property of said David R. Smith, the above-named sum, with interest on the said debt.

Third. That in the records of this court in the office of the clerk thereof there are two judgment-rolls, respectively numbered 885 and 886. Of these the judgement-roll numbered 885, purporting to be a judgement taken by default, was filed 27th April, 1885, for fourteen hundred and forty-six $\frac{83}{100}$ dollars in favor of Edmund T.

sold at a great sacrifice, for the nominal sum of three or four thousand dollars, to Thomas R. McGahan as purchaser thereof, who is a member of the firm of Edwin Bates & Co., the payees, and (as your orator is informed) the real owners of said note and
7 drafts which were sued upon in the name of Edmund T. Krenston and others above named, constituting the firm of M. Brown, Sond & Co., as above set forth.

That the real estate of the said D. R. Smith & Co. and the separate property of D. R. Smith levied upon under said judgements and executions was at the court-house in Kingstree, in the county of Williamsburg, between the hour of eleven in the forenoon and three o'clock in the afternoon on the seventh day of September, 1885, sold by the United States marshal to the above-named Thomas R. McGahan for the sum of thirty-eight hundred and fifty dollars, being an amount far below its real value.

That settlement for purchase was said to have been made by said Thomas R. McGahan in the marshal's office in the city of Charleston, South Carolina, on the 7th September, 1885, the same day as the sale thereof at Kingstree, and a deed of conveyance dated on the same 7th day of September, 1885, was executed and delivered to said Thomas R. McGahan by the said marshal.

The several plantations or tracts of land so pretended to have been sold and conveyed to said Thomas R. McGahan are set forth by description in the deed of E. M. Boykin, United States marshal, a copy of which is herewith filed and marked Exhibit "A."

Your orator is informed and believes it to be true that property valued at not less than thirty thousand dollars, consisting of a valuable mill property and large tracts of valuable lands—timber lands—has been ostensibly sold for about one-tenth of its value.

That immediately after said sale Mrs. E. P. Smith, the wife of D. R. Smith, was by the said Thomas R. McGahan put in possession of the real and personal property so sold and known as Smith's Mills, and has been using the same from the sale day in
8 June, 1885, to the present time and been in actual *perception* of the rents and profits thereof in coll*i*sion with her husband and the said Thomas R. McGahan.

Your orator has called upon the defendants above named, through their attorneys-at-law in the State of South Carolina, to agree to cancel said deed of conveyance and to consent that said sales and judgements under which they were made be set aside and the property of said D. R. Smith & Co. and D. R. Smith be allowed to be distributed equally among the lawful creditors of said D. R. Smith & Co. and of the members of said firm, and has called upon the said Thomas R. McGahan to surrender the same and the title thereof, which he holds unlawfully, as your orators have charged, and have called upon Mrs. E. P. Smith, wife of D. R. Smith, to surrender to said creditors or their agent the property which was of said D. R. Smith & Co. and of D. R. Smith and Walter B. Crane of which she holds possession, and has called upon said D. R. Smith to surrender what property he has in his possession, custody, and control or in the possession of his wife, and which has been in their

possession since said conclusive action was taken and judgements by default was suffered, preceding said sale and conveyance to Thomas R. McGahan; but now so it is that said defendants have refused and still refuse to yield to said just and reasonable requests of your orator and refuse to surrender the property which has so come into their possession and control and persist in pretending that said judgement was lawfully obtained, and that said sales thereunder were lawfully made, and claim title and possession thereof against the just claims of your orator, a judgement creditor of the said D. R. Smith & Co. and of D. R. Smith, as above stated.

To the end, therefore, that the said sales and the judgements under which they were made and the deed or deeds of the said
9 United States marshal purporting to convey the property sold be set aside and declared to be null and void:

That a receiver may be appointed by this court to take possession of said property, real and personal, and to collect the rents and profits thereof, to whom the said D. R. Smith and Mrs. E. P. Smith and Thomas R. McGahan and all other persons who may be liable to account shall be ordered to account; that the same may be eventually sold and the proceeds applied to payment of the respective liens thereon according to their priority, and that the unsecured creditors of D. R. Smith & Company be paid out of the balance of copartnership property and the creditors of the individual partners of said firm out of the individual partner's personal and separate property.

That said Thomas McGahan may be ordered to surrrender such title and possession as he may have acquired thereunder; that said D. R. Smith and Mrs. E. P. Smith, his wife, may severally surrender possession of said property, real and personal; that said Thomas R. McGahan, Mrs. E. P. Smith, and D. R. Smith may discover and account fully for all the rents and profits which they and each of them has received and appropriated and for such as they might have received since they have had possession of said property, and may discover and account fully for any waste and damage done by them and either of them since the same went into their possession, custody, and control; that the said Thomas R. McGahan may answer upon oath (1) that persons composed the firm of Edwin Bates & Company or E. Bates & Company at the time when said note and drafts were signed and delivered to E. Bates & Company by D. R. Smith & Co., and also at the time when they were endorsed respectively, and (2) that he may also set forth and discover who of them were citizens of the State of South Carolina at the date when said note and drafts were executed and at the time when they were endorsed or assigned and *no* the day
10 when said suit was instituted, and may also (3) discover by direction and warrent — said suit was brought; also may upon oath say (4) upon what consideration and at what time and place and under what circumstances and to what person or persons said note and drafts were severally assigned or endorsed, and may answer on oath (5) what consideration was paid to him by D. R. Smith or Mrs. E. P. Smith for the transfer by him to them of the

said property, real or personal; also (6) what arrangement was made with said firm of M. Brown, Sons & Co. and Daniel C. Stelling by which he, Thomas R. McGahan, became purchaser of the property sold under their judgments; that the said Edmund T. Krenston, Percy Lauderdale, T. Wister Brown, Junior, and Moses Brown may severally answer upon oath and say (1) if any and what consideration was paid by them as copartners, composing the firm of M. Brown, Sons & Company for the assignment of said note and drafts to them by E. Bates & Company, and (2) whether or no the said firm of M. Brown, Sons & Co. instructed any one that suit should be brought in their names in the United States circuit — for the district of South Carolina upon said note and drafts against D. R. Smith & Co. or D. R. Smith, and (3) whether there was any agreement with said D. R. Smith, and, if so, what agreement, on the part of said firm of M. Brown, Sons & Company, by the members of said firm or their agents or attorneys, as to said suit and the action taken upon them, to wit, the judgments by default and the sales and conveyance to Thomas R. McGahan and the delivery of possession by him to Mrs. E. P. Smith, wife of D. R. Smith; that Daniel C. Stelling may answer on oath and say (1) when, where, and under what circumstances and upon what consideration paid by him to J. C. H. Claussen & Co. the above-named note and drafts were assigned or endorsed by that firm to him; (2) whether said note and drafts were ever delivered to him, and, if so, when and where
11 they were so delivered, and (3) whether or not said Daniel C. Stelling instructed any one, and, if so, whom, that suit should be brought in his name in the United States circuit court for the district of South Carolina upon said note and drafts against D. R. Smith & Co. or D. R. Smith, and (4) whether there was any agreement with the said D. R. Smith, and, if so, what agreement, on the part of Daniel C. Stelling, by him or his agent or attorneys, as to said suits and the action taken upon them, to wit, judgments by default, the sales and conveyances to Thomas R. McGahan, and the delivery of possession by him to Mrs. E. P. Smith, wife of D. R. Smith.

That said defendants herein named may full, true, and perfect answer make to these matters herein alleged, may it please your honors to grant unto your orator your gracious writ of subpoena, to be directed to the said Edmund T. Krenston, Percy Lauderdale, T. Wister Brown, Junior, and Mrs. E. P. Smith, David R. Smith, Moses Brown, Daniel Stelling, Thomas R. McGahan, commanding them respectively to be and appear before your honors on a day to be herein named and to answer hereto, and for such other and further relief as to your honors it may seem meet to grant unto your orator it will ever pray, &c.

BARKER, GILLILAND & FITZSIMONS,
Attorneys for Complainant.

12 THE STATE OF NEW YORK, } ss.:
County of Ulster, }

Personally appeared before me George H. Sharpe, who, being duly sworn, says that he is the president of The National Bank of Rondout, Rondout, New York, the complainant mentioned in the foregoing bill, — is true insomuch as the statements therein made rest upon his knowledge, and insomuch as they rest upon information and belief he believes it to be true.

GEORGE H. SHARPE.

Sworn to before me this 8th day of February, A. D. 1889.

C. E. HASBROUCK,
Notary Public in and for Ulster County, State of New York.

13 EXHIBIT "A."

Vol. "Q," page No. 558.

DISTRICT OF SOUTH CAROLINA:

E. M. Boykin
to
Thomas R. McGahan.

To all whom these presents may concern I, E. M. Boykin, marshal of the United States for the district of South Carolina, send greeting:

Whereas, by virtue of writs of *fieri facias* issued out of the honorable circuit court of the United States for the district aforesaid, tested the twenty-eighth day of April, in the year of our Lord one thousand eight hundred and eighty-five, and returnable according to law to me directed and lodged in my office on the twenty-eighth day of April, one thousand eight hundred and eighty-five, commanding me of the goods and chattels, houses, lands, and other hereditaments, and real estate of the firm of D. R. Smith & Co. a firm composed of D. R. Smith, W. B. Crane, and of D. R. Smith individually to levy the sum of fourteen hundred and forty-six $\frac{83}{100}$ dollars debts and costs which M. Brown Sons & Co. by the judgement of the said court at Charleston lately recovered against the said D. R. Smith & Co. and D. R. Smith individually, and the sum of nine thousand three hundred and ninety-seven $\frac{17}{100}$ dollars, debts and cost which Danile C. Stelling by the judgement of said court at Charleston lately recovered against the said D. R. Smith & Co. a firm composed of D. R. Smith, and W. B. Crane and D. R. Smith individually, I have levied upon certain plantations or tracts of land with the buildings thereon in the district of South Carolina aforesaid hereinafter more particu-

14 larly described and whereas, after due and legal notice the said plantations or tracts of land were, on the seventh day of September, one thousand eight hundred and eighty-five, being the first Monday in said month, between the hours of eleven in the forenoon and three o'clock

in the afternoon of that day at the court-house in the town of Kingstree, openly, publicly, fairly and according to the custom and usage of vendues, by me sold for and towards satisfaction of the said judgement and executions unto Thomas R. McGahan for the sum of thirty-eight hundred and fifty dollars, being at that price the highest and last bidder for the same.

Now know ye, that, I, E. M. Boykin, marshal as aforesaid, by virtue of the said executions, levies and sales and of the statutes in such cases made and provided, and for and in consideration of the said sum of thirty-eight hundred and fifty dollars to me in hand paid, or caused to be paid according to the terms of the said sale, have granted, bargained and sold and by these presents, do grant, bargain and sell and convey unto the said Thomas R. McGahan: all that tract of land known by the general appellation of "Britton Ferry" with the buildings and improvements thereon (except the steam saw-mill with engines, boilers and all appurtenances belonging thereto known as Smith's mills, which are not to be sold) containing five hundred acres more or less and situated lying and being partly in Williamsburg county and partly in Georgetown county, the boundaries of said tract of land described in a deed from Mary E. Eddy to Clo. Martin, bearing date 10th of August, 1860, being as follows: On the north by lands of E. H. Britton, on the east by Pee Dee river, on the south by lands of L. J. White, and on the west by lands of W. H. Larramore, and being the same lands and premises conveyed to Edwin Tompkins by George North the deed of which is recorded in the office of R. M. C. Georgetown S. C. 20th day of January 1872 in Book "D" of Deeds at pages No. 75, 77, also all that tract of land lying on Snow island, containing eighteen hundred and thirty-six acres, according to a survey and plat thereof made by William Ewin the 27th day of September, 1866; also another tract, on which the former residence of A. W. Dozier stands separated from the tract above named by Clark's creek, and containing two thousand seven hundred and nine acres (2,709) according to a resurvey and plat made thereof by Wm. F. Ewin the 27th day of September, 1866. Also, one other tract, on which the above-named A. W. Dozier's summer house stands, and separated from the second tract above mentioned by the public road leading from Sokee bridge by Mrs. Stone's residence to the old mill known as Johnson's mill and containing one thousand and seventy-five (1,075) acres according to a resurvey and plat thereof made by Wm. F. Ewin, 27th day of April, 1867, the said lands having such forms, marks, buttings and boundings as on reference to said several plats will more fully and at large appear. The said three tracts constituting one united body of land, containing in the aggregate five thousand six hundred and twenty acres, situated lying and being on the south side of Big Pee Dee river in the county of Williamsburg in the State of South Carolina and known as "Longwood Plantation." Also all that tract of land known as the Horse Shoe Lake tract, containing six hundred and eighty-seven acres more or less and situated, lying and being in Marion county, South Carolina; the boundaries of said tract of land described in a deed from

Hugh R. Johnson to W. B. Crane, Edward Tompkins and D. R. Smith, bearing date 12th day of November, 187–, being as follows: On the north and northwest and west by lands of W. K. Martin and O. O. McDuffie, south and southeast by lands of Mrs. Sarah B. Woodemy and the Great Pee Dee river as will be shown and will appear by reference to a plat thereof made by J. Ben. Johnson, deputy surveyor, on the 20th day of December, 1853, said
16 deed from Hugh R. Johnson to W. B. Crane, Edward Tompkins and D. R. Smith was recorded in office of R. M. C. for Marion county, South Carolina, January 30th, 1872, in Book "E E," on pages No. 400 and 401. Also,

All that tract of land in Georgetown county, South Carolina, received by virtue of an execution against J. M. Matthews and deeded to W. C. Crane, Edward Tompkins and D. R. Smith by J. W. Lessesne, sheriff of Georgetown county South Carolina, dated September 6th, 1875, and is recorded in office of R. M. C., G. C., in Book "E" pages No. 540, to 542, February 23rd, 1876.

Together with all and singular the numbers and appurtenances thereunto belonging, and all estate, title and interest w-ich the said firm of D. R. Smith & Company and D. R. Smith individually of right had in and to the same.

To have and to hold the said premises with the appurtenances unto the said Thomas R. McGahan, his heirs and assigns forever.

In witness whereof, I have hereunto set my hand and seal this 7th day of September in the year of our Lord, one thousand eight hundred and eighty-five and of the Independence of the United States of America the one hundred and tenth.

(Signed) E. M. BOYKIN, [SEAL.]
United States Marshal.

Signed, sealed, and delivered in the presence of—
(Signed) C. A. McHUGH.
J. E. BURK.

17–33 STATE OF SOUTH CAROLINA, }
County of Richland. }

Personally appeared before me J. E. Burk and made oath that he saw the within-named E. M. Boykin, U. S. marshal, sign, seal, and as his act and deed deliver the within written deed, and that he, with C. A. McHugh, witnessed the execution thereof.

(Signed) J. E. BURK.

Sworn to before me this 25th day of November, A. D. 1885.

This deed, though executed on the 7th day of September, 1885, was not delivered until November 25th, 1885.

(Signed) J. ANCRUM SIMONS,
Notary Public.

Recorded this eighth day of December, A. D. 1885.

(Signed) H. Z. GRAHAM, *R. M. C.*

STATE OF SOUTH CAROLINA, }
County of Williamsburg. }

(OFFICE OF CLERK OF COURT.)

I, H. Z. Graham, clerk of court and register of mesne conveyance for county and State aforesaid, do hereby certify that the foregoing is a true copy of the deed recorded in my office, in vol. "Q" of Conveyance Records, at pages No. 558, 559, 560, and 561.

Witness my hand and seal this 7th day of May, A. D, 1886, at Kingstree, S. C.

[SEAL.] (Signed) H. Z. GRAHAM,
C. C. P. & G. S.

* * * * * * *

34 And on the 18th day of May, 1889, came into court the defendant Daniel C. Stelling, by his solicitors, and filed the following demurrer:

Demurrer.

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court. In Equity.

THE NATIONAL BANK OF RONDOUT, NEW YORK, a National Banking Association Located in the State of New York, Complainant,

vs.

DAVID R. SMITH, in His Own Right and as Surviving Copartner of D. R. Smith & Co., a Citizen of the State of South Carolina; Mrs. E. P. Smith, Wife of D. R. Smith, a Citizen of the State of South Carolina; Edmund T. Krenston, Percy Lauderdale, T. Wister Brown, Junior, and Moses Brown, Copartners in Trade under the Firm Name of M. Brown, Sons and Company, Citizens of the State of Pennsylvania; Daniel C. Stelling, a Citizen of Georgia, and Thomas R. McGahan, a Citizen of the State of South Carolina, Defendants.

The demurrer of Daniel C. Stelling, defendant, to the bill of complaint of The National Bank of Rondout, New York, a national banking association, located in the State of New York, complainants.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur in law to the said bill, and for cause of demurrer showeth that the said complainant hath not by its said bill made such a case as entitles it in a court of equity to any discovery or relief from or against this defend-
35–42 ant touching the matters contained in the said bill or any of such matters; wherefore, and for divers other good causes of

demurrer appearing in the said bill of complaint, this defendant doth demur to the said bill and to all the matters and things therein contained, and prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

J. ANCRUM SIMONS,
MITCHELL & SMITH,
Solicitors for Defendant.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

J. ANCRUM SIMONS.
MITCHELL & SMITH.

STATE OF GEORGIA,
County of Richmond.

Before me, Samuel Levy, a commissioner of the circuit court of the United States for the southern district of Georgia, personally appeared Daniel C. Stelling, defendant above named, and made oath that the foregoing demurrer is not interposed for delay.

DANIEL C. STELLING.

Sworn to and subscribed before me this seventeenth May, A. D. 1889, as witness my hand and official seal.

SAMUEL LEVY,
United States Circuit Court Commissioner for the Southern District of Georgia.

[SEAL.]

Filed 18th May, 1889.

* * * * * * *

43 And on the 3rd day of December, 1890, the court passed the following order sustaining demurrer:

Order.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit. In Equity.

THE NATIONAL BANK OF RONDOUT, NEW YORK, a National Banking Association Located in the State of New York, Complainant,

vs.

D. R. SMITH, E. P. SMITH, and Others, Defendants.

This cause having come on to be heard at the November term, 1890, upon the demurrer of Daniel C. Stelling to the bill of complaint herein, and counsel on both sides having been heard—

It is thereupon adjudged and decreed that the said demurrer be sustained.

December 3rd, 1890.

HUGH L. BOND, *C't Judge.*

Filed 3rd December, 1890.

44 And on the 3rd day of December, 1890, came into court the complainant, by its solicitors, and obtained the following order allowing appeal:

Order.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit. In Equity.

THE NATIONAL BANK OF RONDOUT, Rondout, New York, Complainant,
vs.
DAVID R. SMITH, DANIEL C. STELLING, and Others, Defendants.

The complainant in above-entitled cause having in open court, at the present term of this court, prayed that an appeal be allowed to it from the judgment of this court sustaining the demurrer of Daniel C. Stelling, defendant, and dismissing the bill—

It is ordered that said appeal be allowed.

December 3rd, 1890.

HUGH L. BOND, *C't Judge.*

Filed 3rd December, 1890.

45 And on the 14th day of March, 1891, came into court the complainant, by its solicitors, and filed the following bond:

Bond.

THE UNITED STATES OF AMERICA:

Know all men by these presents that we, The National Bank of Rondout, Rondout, New York; William Hutton, of the city of Kingston, New York, and Jacob H. Tremper, of the same place, are held and firmly bound unto Daniel C. Stelling, a citizen of Georgia, in the full and just sum of two hundred and fifty dollars, to be paid to the said Daniel C. Stelling or his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of ——, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a regular term of the circuit court of the United States for the fourth circuit in the district of South Carolina, in a suit depending in said court between The National Bank of Rondout, Rondout, New York, complainant, and David R. Smith, Daniel C. Stelling, and others, as defendants, a decree was rendered against the

said complainant on the demurrer of said Daniel C. Stelling, dismissing said bill against the said defendant, Daniel C. Stelling, and the said complainant having obtained leave to appeal to the Supreme Court of the United States from said decree, and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and an appeal taken in open court from said decree was allowed by the presiding judge to a Supreme Court of the United States to be holden at Washington the — Monday of —— next:

Now, the condition of the above obligation is such that if the said The National Bank of Rondout, of Rondout, New York, appellant, shall prosecute said appeal to effect and answer all dam-
46 ages and costs if it fails to make its said plea good, then the above obligation to be void; else to remain in full force and virtue.

THE NATIONAL BANK OF RONDOUT,
By WM. HASBROUCK, *Pres'd't.*
JOHN B. ALLIGER, *Cashier.*
[SEAL.] WM. HUTTON. [L. S.]
JACOB H. TREMPER. [L. S.]

Sealed and delivered in presence of—as to all parties—

HOWARD CHIPP, JUN'R,
A. W. THOMPSON,
Witnesses.

Approved.
CHARLES H. SIMONTON,
U. S. Judge.
14th March, 1891.

47 THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

In the Circuit Court. In Equity.

The United States of America to David R. Smith, in his own right and as surviving copartner of D. R. Smith & Co.; Mrs. E. P. Smith, wife of D. R. Smith; Edmund T. Krenston, Percy Lauderdale, T. Wister Brown, Junior, and Moses Biown, copartners in trade under the firm name of M. Brown, Sons & Co.; Daniel C. Stelling and Thomas R. McGahan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in May next, pursuant to an order allowing an appeal, filed in the clerk's office of the United States circuit court for the district of South Carolina, wherein The National Bank of Rondout, Rondout, New York, is complainant, and you are defendant, to show cause, if any there be, why the judgment in the said order sustaining demurrer and dismissing the bill should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness my hand and seal, at the city of Charleston, S. C., in the district aforesaid, this 16 day of March, A. D. 1891.

[Seal U. S. Circuit Court, District of So. Carolina.]

CHARLES H. SIMONTON, *U. S. Judge.*

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

48 [Endorsed:] No. roll, —. United States of America, district of South Carolina, fourth circuit. In the circuit court. The National Bank of Rondout, N. Y., plaintiff, against David R. Smith *et al.*, defendant-. Citation. —— ——, attorney. Filed 16th day of M'ch, 1891. J. E. Hagood, C. C. C. U. S., dist. S. C.

Service accepted this 16th day of March, A. D. 1891.

J. N. NATHANS,
For Thos. R. McGahan.
J. ANCRUM SIMONS,
Att'y D. C. Stelling.
SAMUEL LORD,
P'r J. N. NATHANS,
For D. R. & E. P. Smith.

49 THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court, Fourth Circuit.

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing is a true and correct copy of all the records, proceedings, and decree, &-., in the case of The National Bank of Rondout, Rondout, New York, complainant, against David R. Smith and others, defendants, rendered as aforesaid, together with all the proceedings had in the cause relating to the same.

Given under my hand and seal of said court, at clerk's office, in the city of Charleston and district of South Carolina, this the 25th day of March, 1891.

[Seal U. S. Circuit Court, District of So. Carolina.]

J. E. HAGOOD,
C. C. C. U. S., Dis. S. C.

50 THE UNITED STATES OF AMERICA:

In the Supreme Court.

THE NATIONAL BANK OF RONDOUT, Rondout, New York, a National Banking Association Located in the State of New York, Complainant, Appellant,

vs.

DAVID R. SMITH, in His Own Right and as Surviving Copartner of D. R. Smith & Co., a Citizen of the State of South Carolina; Mrs. E. P. Smith, Wife of D. R. Smith, a Citizen of South Carolina; Edmund T. Krenston, Percy Lauderdale, T. Wister Brown, Junior, and Moses Brown, Copartners in Trade under the Firm Name of M. Brown, Sons & Co., Citizens of the State of Pennsylvania; Daniel C. Stelling, a Citizen of Georgia, and Thomas R. McGahan, a Citizen of the State of South Carolina, Defendants, Appellees.

Statement of errors relied on by appellant and notice of parts of the record which complainant thinks necessary for the consideration of said errors.

The appellant in the above-named case on appeal to the supreme court intends to rely upon the following errors which it assigns to the decree of the circuit court made therein, viz:

1st. That the circuit court erred in sustaining the demurrer of defendant Daniel C. Stelling and in dismissing the bill as to said Daniel C. Stelling, defendant.

2nd. The demurrer admitted the following allegations of the bill:

(*a.*) That defendant Stelling obtained a judgment in the circuit court of the United States for the fourth circuit and district of South Carolina on April 27, 1885, for nine thousand three hundred and ninety-seven $\frac{17}{100}$ dollars in favour of Daniel C. Stelling, as a citizen of Georgia, against D. R. Smith & Co., citizens of South Carolina.

(*b.*) That said judgment was taken by the default of D. R. Smith, the copartner of the firm of D. R. Smith & Co., who was served in Charleston, South Carolina, on the same day on which the summons and complaint were filed.

(*c.*) That said judgment was suffered by said D. R. Smith to be taken in favour of the plaintiff in the action, Daniel C. Stelling, by collusion with said plaintiff, and with a view to the protec-
51 tion of the property of said D. R. Smith against his other creditors and to defeat their claims.

(*d.*) That the causes of action upon which said judgment purports to have been recovered were one promissory note and eight drafts for several amounts, respectively signed by D. R. Smith & Co. and payable to the order of J. C. H. Claussen & Co., the members of which firm were all at the time when the action was commenced citizens of the State of South Carolina and of the same State with the defendant in said action, David R. Smith.

(*e.*) That the complaint in said action does not show that the

promissory note and drafts sued on were negotiable by the law merchant; does not show when the said note and drafts were endorsed by the payees to Daniel C. Stelling, the plaintiff therein, whether before or after maturity; does not show that it was not endorsed after maturity and after said promissory note and drafts had ceased to be negotiable by the law merchant; does not show the names of the members of the firm of J. C. H. Claussen and Co., the payees of said note and drafts, nor their citizenship, nor that when said action was brought and judgment taken the members of said firm were citizens of a State other than the State of South Carolina, of which State the drawer, David R. Smith, the defendant, who was sued, was a citizen.

(*f.*) That jurisdiction in the circuit court of the United States was attempted to be obtained by the plaintiff in said action by suppressing the fact that the payee of said note was a citizen of the same State with the maker thereof, who was the defendant in said suit.

(*g.*) That the bill charged and the demurrer admitted that simultaneously with the judgment obtained as above stated by Daniel C. Stelling a summons and complaint was filed and served on David R. Smith at Charleston, S. C., by M. Brown, Sons & Co., as citizens of Pennsylvania, and judgment taken by default against D.
52 R. Smith & Company and suffered to be taken by D. R. Smith in favour of said last-named plaintiffs on one promissory note signed by D. R. Smith & Co., payable to the order of Edwin Bates & Co., all of the members of which firm were at the time *of* said action was begun and said judgment taken citizens of the State of South Carolina, the same State as that of D. R. Smith, defendant in said action; that said judgment was obtained by M. Brown, Sons & Co. and suffered by D. R. Smith by collusion with said plaintiffs and with a view to the protection of the property of the said D. R. Smith against his other creditors and to defeat and defraud them of their just rights, and that jurisdiction in the circuit court of the United States was attempted to be obtained by the plaintiffs in said action unlawfully and by suppressing the fact that the payees and alleged endorsers of said note and drafts were citizens of the same State with the makers and drawers thereof, who were defendants in said action.

(*h.*) The bill further alleged and the demurrer admitted that executions upon both of said judgments were issued simultaneously, directed to the United States marshal for the district of South Carolina and entered on the same day, April 28, 1885, in his office; that said executions were levied upon the partnership property of said D. R. Smith & Co. on the same day, April 30, 1885, three days after the judgments were obtained; that property of D. R. Smith & Co., consisting of a steam saw-mill, engines, &c., valued at not less than thirty thousand dollars, was sold at a great sacrifice for the nominal sum of three or four thousand dollars to Thomas R. McGahan as purchaser thereof, who is a member of the firm of Edwin Bates & Co., the payees and real owners of the note and drafts sued upon in the name of M. Brown, Sons & Co.; that the

real estate of said D. R. Smith & Co. and the separate property of D. R. Smith was levied upon under said judgments and sold
53 by the United States marshal for the sum of thirty-eight hundred and fifty dollars, an amount far below its real value, on the 7th day of September, 1885, at Kingstree, in the State of South Carolina, to the same Thomas R. McGahan; that settlement was said to have been made by said Thomas R. McGahan in the marshal's office, in Charleston, S. C., on the same day on which it was sold by the said marshal at Kingstree, S. C., and a deed of conveyance, dated on same day, delivered to said Thomas R. McGahan by the said marshal; that property valued at not less than thirty thousand dollars was ostensibly sold for about one-tenth of its value; that immediately after the sale Mrs. E. P. Smith, the wife of D. R. Smith, was, by said Thomas R. McGahan, put in possession of the real and personal property so sold, and has been using the same from the sales day in June, 1885, to the date of the filing of the bill of complaint herein, and has been in actual perception of the rents and profits thereof, in collusion with her husband and the said Thomas R. McGahan.

Upon the above-stated facts, alleged by the bill and admitted by the demurrer, the circuit court should have overruled the demurrer and decreed for the complainant according to the prayer of the bill; and it was error to sustain the demurrer and to dismiss the bill as to Daniel C. Stelling, defendant.

The parts of the record which complainant thinks necessary for the consideration of the errors on which it intends to rely are as follows:

1. The bill of complaint.
2. The demurrer of Daniel C. Stelling, defendant.
3. The joinder in demurrer by complainant.
4. The minutes of the court showing the hearing of the demurrer.
5. The decree of the circuit court sustaining the demurrer and dismissing the bill of complaint as to Daniel C. Stelling.
54 6. The notice of appeal given in open court.
7. The prayer for appeal.
8. The order allowing the appeal.
9. The appeal bond of complainant, and memorandum of the approval thereof, and of the filing thereof.
10. The citation and memorandum of the service thereof.

THEODORE G. BARKER,
Solicitor for Appellant.

[Endorsed:] No. 1687. The United States of America. In the Supreme Court, Oct'r term, 1890. The National Bank of Rondout, Rondout, New York, a national banking association located in the State of New York, complainant, appellant, *vs.* David R. Smith, in his own right and as surviving copartner of D. R. Smith & Co., *et al.*, defendants, appellees. Statement of errors relied on by appellant and notice of parts of record necessary for consideration of

same. Theodore G. Barker, solicitor for complainant. Office Supreme Court U. S. Filed Apr. 6, 1891. James H. McKenney, clerk.

STATE OF SOUTH CAROLINA,)
Charleston County.)

We admit due and legal service of a copy of within statement and notice this 4th day of April, 1891.

J. N. NATHANS,
Sol. for Thos. R. McGahan.
S. LORD,
Sol. for D. R. & E. P. Smith.
J. ANCRUM SIMONS,
Att'y for D. C. Stelling.

Endorsed on cover: Case No. 14,552. S. Carolina C. C. U. S. No. 113. The National Bank of Rondout, New York, appellant, *vs.* David R. Smith, in his own right and as surviving copartner of D. R. Smith & Co., *et al.* Filed March 30, 1891.

Supreme Court of the United

156-350

OCTOBER TERM, 1894.

No. 113.

THE NATIONAL BANK OF RONDOUT, [illegible] OUT, NEW YORK, Appellant.

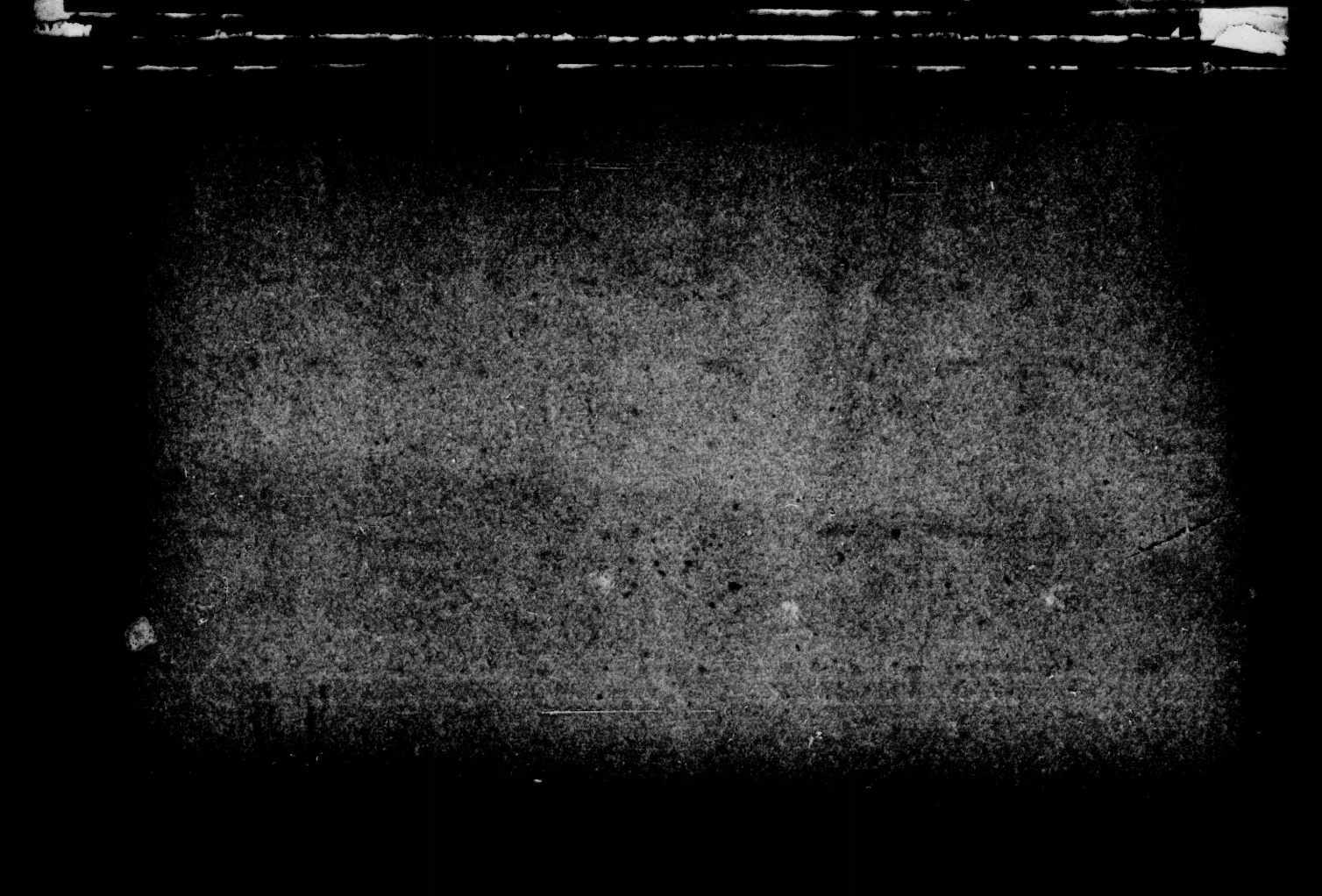
vs.

DAVID R. SMITH, in his own right and as [illegible] Co-Partner of D. R. SMITH & CO., Et Al., Appellees.

Appeal from the Circuit Court of the United States for the District of South Carolina.

Brief of Theodore G. Barker, for Appellant.

CHARLESTON, S. C.



Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 113.

THE NATIONAL BANK OF RONDOUT, ROND-OUT, NEW YORK, APPELLANT.

vs.

DAVID R. SMITH, IN HIS OWN RIGHT AND AS SURVIVING CO-PARTNER OF D. R. SMITH & CO., THOMAS R. McGAHAN. DANIEL C. STELLING, ET AL., APPELLEES.

Appeal from the Circuit Court of the United States for the District of South Carolina.

Brief of Theodore G. Barker, for Appellant.

STATEMENT OF THE CASE.

This appeal is from a decree sustaining a general demurrer to a bill in Equity.

The complainant below, the National Bank of Rondout, Rondout, New York, holding a judgment of the United States Circuit Court for the District of South Carolina, entered 15th

December, 1887, against D. R. Smith, surviving copartner of D. R. Smith & Company for the sum of $13,844 $\frac{74}{100}$ and costs of suit, claimed to be entitled, thereby, to recover said sum against D. R. Smith, as such surviving copartner and individually, and, under the lien of said judgment the right, to be paid out of the property of said firm and out of the individual property of said David R. Smith.

All of said property is claimed by defendant Thomas R. McGahan as purchased by him under the sale by the United States marshal in September, 1885, under certain judgments said to have been recovered in the said Circuit Court by defendant M. Brown Sons & Co., and by Daniel Stelling, respectively, against D. R. Smith & Co.

The bill in this case attacks the validity of said judgments, and of the levy and sales made thereunder, on the grounds of collusion to create a case cognizable by the United States Court, on the ground of fraud, and on the ground of want of jurisdiction in the Court of the United States in which the judgments were rendered, and by which the sales were made.

One of these judgments (Judgment Roll, No. 885) purports to be a judgment taken by default, April 25, 1885, upon a certain note and certain drafts for $1,446.83 in favor of M. Brown Sons & Co., of the State of Pennsylvania. This judgment, it is charged in the bill, and is admitted by the demurrer, was obtained by suppressing allegations of citizenship which, if properly made, would have defeated the jurisdiction therein attempted to be used, and by fraud and collusion between the defendant in said action, D. R. Smith, of South Carolina, and the assignor of the plaintiff, Edwin Bates & Co., also of South Carolina, the real owners of the note and drafts, and between said D. R. Smith and Thomas R. McGahan, the purchaser at the sales made by the United States marshal.

The *other* judgment (Judgment Roll, No. 886) purports to be a judgment taken by default April 27, 1885, for $9.397.17 in favor of Daniel Stelling, a citizen of Georgia, against the said firm of D. R. Smith & Co., composed of D. R. Smith, a citizen of South Carolina, and Walter B. Crane, a citizen of New York, but is entered only against the property of said firm and the individual property of said D. R. Smith.

This judgment also, as the bill in this case charges and the demurrer admits, was obtained by suppressing allegations of citizenship, which, if properly made, would have defeated the jurisdiction attempted to be used, and by fraud and collusion between the defendant in said action, D. R. Smith, a citizen of South Carolina, and the assignor of the plaintiff, J. C. H. Claussen & Co., also a citizen of South Carolina, the real owners of the note and drafts, and between the plaintiff, Daniel C. Stelling, the defendant, D. R. Smith, and Thomas R. McGahan, the purchaser at the sales made by the United States marshal.

The judgment in favor of Daniel Stelling purports to count upon a summons and complaint dated and filed March 13, 1885, in the Clerk's office of the Circuit Court of the United States at Charleston, South Carolina, and the summons served on same day on D. R. Smith, in Charleston. (Record, p. 3, fol. 5.)

The causes of action upon which said judgment purports to have been recovered are as follows, viz.: One promissory note and eight drafts, for several amounts, respectively signed D. R. Smith & Co, and payable to the order of J. C. H. Claussen & Co., at Charleston, S. C., and each of them endorsed *in blank*, by J. C. H. Claussen & Co. (*Record, p. 3, fol. 5.*)

The record in said action fails to show the names of the copartners who composed the firm of J. C. H. Claussen & Co., or to show when said note and drafts were endorsed in blank by said firm, and does not show upon the record the citizenship of the members of said firm. (*Record, p. 3, fol. 5.*)

The record further fails to show, that the members of said firm of J. C. H. Claussen & Co., payees and endorsees respectively of said promissory note and drafts were at the date when said action was brought and when judgment was filed, citizens of a State other than the State of South Carolina, whereof the defendant, D. R. Smith, was then a citizen. (*Ib.*)

The bill in this case alleges, that said firm of J. C. H. Claussen & Co. at that time was composed of J. C. H. Claussen, a citizen of South Carolina, J. H. Claussen, a citizen of South Carolina, and H. H. Claussen, a citizen of South Carolina, and of the same State with the defendant in said suit, D. R. Smith.

The bill charges that jurisdiction in this Court of said action was attempted to be obtained by the plaintiff in said action by

suppressing the fact that the payee of said note was a citizen of the same State with the maker thereof, who was the defendant in said suit. (*Record, p.* 3, *fol.* 6.)

The bill further charges, that the said judgment by default was suffered by the said D. R. Smith in favor of the plaintiff named therein by collusion with said plaintiff, and with a view to the protection of the property of said D. R. Smith against the other creditors and to defeat their just rights. (*Ib.*)

The bill further charges (*Record, p. 3, folio 6,*) that execution was issued upon said judgment, (Judgment Roll No. 886, in favor of Daniel C. Stelling,) *simultaneously with* execution of the judgment, (Judgment Roll No. 885,) in favor of M. Brown, Sons & Co., (also charged to have been obtained by suppression of citizenship of parties, and by collusion with defendant thereon, David R. Smith, and with the view to protect the property of said D. R. Smith against his other creditors.) (*Record, p. 2, folio 4.*)

These executions were entered in the marshal's office in Charleston, S. C., on the 28th April, and were levied simultaneously on the partnership property of D. R. Smith & Co., at Smith's Mills, S. C., on the 30th April, 1885.

The bill charges (*Record, p. 4, folio 7,*) that the steam saw mill and engines, boilers and all appurtenances, valued at not less than $30,000, were sold at a great sacrifice for the nominal sum of $3,000 or $4,000, to the defendant herein, Thomas R. McGahan, as purchaser who was then and is a member of the firm of Edwin Bates & Co, the payees and real owners of the note and drafts (included in the judgment, No. 885,) which were sued upon in the name of M. Brown, Sons & Co.

The bill charges that the real estate of said D. R. Smith & Co., and the separate property of D. R. Smith, levied upon under said judgments and executions, was at the Court House in Kingstree, in the County of Williamsburg, on the 7 September, 1885, sold by the United States marshal, to the above named Thomas R. McGahan, for $3,850, being an amount far below its real value.

That settlement for said purchase was said to have been made by said Thomas R. McGahan, in the marshal's office in the

City of Charleston, S. C, on the 7th September, 1885, the same day as the sale thereof at Kingstree, and a deed of conveyance dated the same 7th day of September, 1885, was executed and delivered to said Thomas R. McGahan.

The bill alleges that property valued at not less than $30,000, consisting of a valuable mill property and large tracts of valuable lands, timber lands, has been ostensibly sold for about 1-10 of its value.

The bill further alleges (*Record, p. 4, folio 7 and 8,*) that immediately after said sale Mrs. E. P. Smith, the wife of D. R. Smith, was by said Thomas R. McGahan put in possession of the real and personal property so sold, and known as Smith's Mills, and has been using the same from the sale-day in June, 1885, to the present time, and been in actual perception of the rents and profits thereof in collusion with her husband and said Thomas R. McGahan.

The bill prays (*Record, p. 5, folio 9,*) that said sales and the judgments under which they were made, and the deed or deeds of the United States marshal purporting to convey the property sold be set aside and declared null and void.

Also that a Receiver be appointed to take possession of said property, real and personal, and to collect the rents and profits thereof, to whom the said D. R. Smith and Mrs. E. P. Smith and Thomas R. McGahan and all other persons may be ordered to account; that the same may be eventually sold and the proceeds applied to payment of the respective liens thereon according to their priority, and that the unsecured creditors of D. R. Smith & Company be paid out of the balance of co-partnership property, and the creditors of the individual partners of said firm out of the individual partners' personal and separate property. That said Thomas R. McGahan may be ordered to surrender such title and possession as he may have acquired thereunder; that said D. R. Smith and Mrs. E. P. Smith, his wife, may severally surrender possession of said property, real and personal; that said Thomas R. McGahan, Mrs. E. P. Smith and D. R. Smith may discover and account fully for all the rents and profits which they and each of them has received and appropriated, and for such as they might have received since they have had possession of said property, and may discover

and account fully for any waste and damage done by them or either of them since the same went into their possession, custody and control.

That said Thomas R. McGahan may discover, (1,) what persons composed the firm of Edwin Bates and Company, or E. Bates & Company, at the time when said note and drafts were signed and delivered to E. Bates and Company by D. R. Smith & Co., and also at the time when they were endorsed respectively, and (2,) who of them were citizens of the State of South Carolina at the date when said note and drafts were executed, and at the time when they were endorsed or assigned, and on the day when said suit was instituted; and (3) (*Record, p. 5, olio 10*) by whose direction and warrant said suit was brought, and (4) upon what consideration and at what time and place and under what circumstances, and to what person or persons said note and drafts were severally assigned or endorsed.

Also, (5) what consideration was paid to him by D. R. Smith & Co., or Mrs. E. P. Smith for the transfer by him to them of the said property, real or personal.

Also, (6) what arrangement was made with said firm of M. Brown, Sons & Co. and Daniel C. Stelling, by which he, Thomas R. McGahan, became purchaser of the property sold under their judgments.

The bill also prayed that defendants Edmund J. Krenston, Percy Lauderdale, J. Wistar Brown, Junior, and Moses Brown may discover (1) if any and what consideration was paid to them as copartners, composing the firm of M. Brown, Sons & Co., for the assignment of said note and drafts to them by E. Bates & Co., and (2) whether or no the said firm of M. Brown, Sons & Co. instructed any one that suit should be brought in their name in the United States Circuit Court for the District of South Carolina upon said note and drafts against D. R. Smith & Co., or D. R. Smith, and (3) whether there was any agreement with said D. R. Smith, and if so what agreement, on the part of M. Brown, Sons & Co. by the members of said firm, or their agents or attorneys, as to said suit and the action taken upon them, to wit: the judgment by default and the sales and conveyance to Thomas R. McGahan, and the delivery of possession by him to Mrs. E. P. Smith, wife of D. R. Smith.

The bill also prayed (*Record p. 6, fol. 10 and 11*) that Daniel C. Stelling may discover (1) when, where and under what circumstances, and upon what consideration paid by him to J. C. H. Claussen &. Co, the above named note and drafts were assigned or endorsed by that firm to him, (2) whether said note or drafts were ever delivered to him, and if so when, where and by whom they were so delivered, (3) whether or not said Daniel C. Stelling instructed any one, and if so whom, that suit should be brought in his name in the United States Circuit Court of South Carolina upon said note and drafts against D. R. Smith & Co. or D. R. Smith, and (4) whether there was any agreement with the said D. R. Smith, and if so what agreement on the part of Daniel C. Stelling, by him, his agent or attorneys as to said suits and the action taken upon them, to wit: the judgments by default, the sales and conveyances to Thomas R. McGahan, and the delivery of possession by Mrs E. P. Smith, wife of D. R. Smith.

To the bill in this case the defendant, Daniel Stelling, interposed a general demurrer. (*Record p. 10, fol. 34.*)

The cause having come on to be heard at the November Term, 1890, in the Circuit Court of the Fourth Circuit for the District of South Carolina, a decree was entered by his Honor Hugh L. Bond, Circuit Judge, on 3d December, 1890. (*Record p. 11, fol. 43*), sustaining the demurrer. An appeal was allowed to complainant "from the judgment of this Court sustaining the demurrer of Daniel C. Stelling, and dismissing the bill," December 3, 1890. (*Record p. 12, fol. 44.*)

Appellant, The National Band of Rondout, N. Y., assigns the following errors:

ASSIGNMENT OF ERRORS.

1. That the Circuit Court erred in sustaining the demurrer of defendant Daniel C. Stelling, in dismissing the bill as to said Daniel C. Stelling, defendant.

2. The demurrer admits of the following allegations of the bill:

(a) That defendant, Stelling, obtained a judgment in the Circuit Court of the United States for the Fourth Circuit, and Dis-

trict of South Carolina, on April 27, 1885, for $9,397.17, in favor of Daniel C. Stelling, as a citizen of Georgia, against D. R. Smith & Co., citizens of South Carolina. (*Record p. 2 and 3, fol. 5.*)

(b) That said judgment was taken by default of D. R. Smith, the copartner of the firm of D. R. Smith & Co., who was served in Charleston, South Carolina, on the same day on which the summons and complaint were filed.

(c.) That said judgment was suffered by said D. R. Smith to be taken in favor of the plaintiff in the action, Daniel C. Stelling, by collusion with the said plaintiff, and with a view to the protection of the property of said D. R. Smith, against his other creditors and to defeat their claims.

(d.) That the causes of action upon which said judgment purports to have been recovered were one promissory note and eight drafts for several amounts respectively signed by D. R. Smith & Co., and payable to the order of J. C. H. Claussen & Co., the members of which firm were all at the time when the action was commenced, citizens of the State of South Carolina, and of the same State with the defendant in said action, David R. Smith.

(e.) That the complaint in said action does not show that the promissory note and drafts were negotiable by the law merchant, does not show when said note and drafts were endorsed by the payees to Daniel C. Stelling, the plaintiff therein, whether before or after maturity; does not show that it was not endorsed after maturity, and after said note and drafts had ceased to be negotiable by the law merchant; does not show the names of the members of the firm of J. C. H. Claussen & Co., the payees of said note and drafts, nor their citizenship, nor that, when said action was brought and judgment taken, the members of said firm were citizens of a State other than the State of South Carolina, of which State the drawer, David R. Smith, the defendant, who was sued, was a citizen.

(f.) That jurisdiction in the Circuit Court of the United States was attempted to be obtained by the plaintiff in said ac-

tion, by suppressing the fact that the payee of said note was a citizen of the same State with the maker thereof, who was the defendant in said suit.

(g.) That the bill charged and the demurrer admitted, that simultaneously with the judgment obtained, as above stated by Daniel C. Stelling, a summons and complaint was served on David R. Smith, at Charleston, S. C., by M. Brown Sons & Co., as citizens of Pennsylvania, and judgment taken by default against D. R. Smith & Co., and suffered to be taken by D. R. Smith in favor of said last named plaintiff on one promissory note, signed by D. R. Smith & Co., payable to the order of Edwin Bates & Co., all of the members of which firm were at the time said action was begun and said judgment taken, citizens of the State of South Carolina, the same State as that of D. R. Smith, defendant in said action; that said judgment was obtained by M. Brown Sons & Co., and suffered by D. R. Smith by collusion with said plaintiffs and with a view to the protection of the property of the said D. R. Smith, against his other creditors and to defeat and defraud them of their just rights, and that jurisdiction in the Circuit Court of the United States was attempted to be obtained by the plaintiffs in said action unlawfully, and by suppressing the fact that the payees and alleged endorsers of said notes and drafts were citizens of the same State, with the makers and drawers thereof, who were defendants in said action.

(h.) The bill further alleged and the demurrer admitted that executions upon both of said judgments were issued simultaneously, directed to the United States marshal for the District of South Carolina, and entered on the same day, April 28th, 1885, in his office; that said executions were levied upon the partnership property of said D. R. Smith & Co., on the same day, April 30th, 1885, three days after the judgments were obtained; that property of D. R. Smith & Co., consisting of a steam saw-mill, engines, &c., valued at not less than thirty thousand dollars, was sold at a great sacrifice for the nominal sum of three or four thousand dollars, to Thomas R. McGahan, as purchaser thereof, who is a member of the firm of Edwin

Bates & Co., the payees and real owners of the note and drafts sued upon, in the name of M. Brown Sons & Co.; and that the real estate of D. R. Smith & Co., and the separate property of D. R. Smith was levied upon under said judgments and sold by the United States marshal, for the sum of thirty-eight hundred and fifty dollars, an amount far below its real value, on the 7th day of September, 1885, at Kingstree, in the State of South Carolina, to the same Thomas R. McGahan; that settlement was said to have been made by said Thomas R. McGahan, in the marshal's office, in Charleston, S. C., on the same day on which it was sold by said marshal, at Kingstree, S. C., and a deed of conveyance dated on the same day, delivered to said Thomas R. McGahan by said marshal; that property, valued at not less than thirty thousand dollars, was ostensibly sold for about one-tenth of its value; that immediately after the sale Mrs. E. P. Smith, the wife of D. R. Smith, was, by said Thomas R. McGahan, put in possession of the real and personal property so sold and has been using the same from the sales made in June, 1885, to the date of the filing of the bill of complaint herein, and has been in actual perception of the rents and profits thereof, in collusion with her husband and said Thomas R. McGahan.

Upon the above state of facts, alleged by the bill and admitted by the demurrer, the Circuit Court should have overruled the demurrer and decreed for the complainant according to the prayer of the bill; and it was error to sustain the demurrer and to dismiss the bill as to Daniel Stelling, defendant.

BRIEF OF ARGUMENT.

POINT FIRST.

The Demurrer Admits the Complainant's Case.

"A demurrer being founded on the bill itself necessarily admits the truth of the facts contained in the bill or in the part of the bill to which it extends."

Mitford's Pl., p. 24.

"A demurrer is an allegation of a defendant, which admitting the matter of fact alleged by the bill to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer." *Ib. p., 28.*

"Its office is to bring before the Court the right to maintain the bill upon the admission, *pro hac vice, of the entire truth of all its allegations.*"

Ocean Ins. Co. vs. Fields, 2 Story Rep. 77, 59.

"It seems that the Court upon the argument of a demurrer decides upon the facts, as stated in the bill, whether if the cause were to proceed to a hearing, and they were proved or confessed, a decree would then be made.

(*See 12 Vesey, Jr., 97; Brooks vs. Herriott, 3 Vesey, 253; 6 Vesey, 686; 7 Vesey, 245; 2 Sch. & Life, 638; 6 Madd. 95,* (*2.*)

"As a demurrer relies merely upon matter apparent on the face of the bill so much of the bill, as the demurrer extends to, is taken for true. (*2 Vesey and Bea. 95, 1 Madd. R. 565. Pryer & Adams, Call. R. 391.*) thus if a demurrer is to whole bill, the whole bill is taken for true."

Ib. 249 (*211.*)

A demurrer must express the several causes of demurrer (*See 3 Madd, 8; 1 Jac R., 467, and see Harrison vs. Hogg, 2 Ves., Jun. 323.*) * * If a demurrer is general to the whole bill, and there is any part, either as to the relief or the discovery to which the defendant ought to put in an answer, it was generally considered that the demurrer being entire must be overruled (*1 Vesey,* 248. *Earl of Suffolk vs. Green,* 1 *Atk.* 450; *Todd vs. Gee,* 17 *Vesey,* 273; 1 *Swanston,* 304; 1 *Jac R.,* 467, (1.)

Ib. 253 (214.)

"Demurrer held in part is bad *in toto.* 5 *John's Ch. R.* 186, 1 *Id.* 51. * *) Where the bill charged a "fraudulent concealment of title, while complainant was making improvements" a general demurrer to the whole bill to such a charge of fraud is bad. The charge of fraud direct and positive must be met otherwise than by a demurrer. (*Carter vs. Longworth et al.,* 4 *Ohio, R.* 836; *condensed from* 4 *Hammond,* 384; *see also Higgins & Burnet,* 5 *Johns, C. R.* 184.")

"A demurrer for want of equity cannot be sustained unless the Court is satisfied, that no discovery or proof, properly called for by, or founded upon, the allegation in the bill, can make the subject matter of the suit a proper case for equitable cognizance."

Bleeker vs. Bingham, 3 *Paiye's Ch. R.* 246."

"Whether general or special a demurrer admits all such matter of fact as are sufficiently pleaded, and to that extent it is a direct admission that the facts alleged are true. (1 *East,* 634, 1 *Term Rep.,* 334.)

Christmas vs. Russell, 5 *Wall,* 303. *Griffin vs. Gibb,* 2 *Black.* 519.

This Court held as follows in the case of

Davis vs. Tileston, 6 *How U. S., Rep.* 114. (Italics ours.) viz:

"The judgment in this case below was founded entirely on the bill in Chancery and the general demurrer to it. * * * The only question

for consideration by us then is whether the judgment dismissing the bill on the demurrer was correct.

Upon a careful examination of the facts and principles involved we feel constrained to come to the conclusion that it was not correct. We are reluctant to form the conclusion because on examining the contents of the bill it does not in some aspects of it appear to be free from what is exceptionable, and the answer, if open to consideration now, would show a denial of most of its material allegations.

But, as the answer in the present decision must be put out of the question, and *as the demurrer admits all facts duly alleged* in the bill the plaintiff seems entitled to judgment on these admissions. * * *

The demurrer, by admitting the truth of the allegations in the bill, admits these facts:

1st. That the complainant had a good defence to a large part of the original judgment recovered against him as garnishee of the bank, and which he did not know at that time.

2d. That he was entitled to pay to the original creditor, the bank, its own notes in discharge of any balance due to it and which were under par, and that *through fraud* between the banks and the respondents, the demand against him was assigned to them, and he sued as garnishee of the bank in order to exclude the payment in its notes.

The former judgment having been in the District Court of the United States, these grounds for an injunction against the further enforcement of it till the mistake as to the defence be corrected and the balance allowed to be satisfied in notes of the bank then held, or an equivalent to their value at the time of the judgment, *seems equitable on these allegations thus admitted.*

The respondents can *ex æquo et bono* claim to stand in no better condition than the bank. If there was a further good defence against the bank there was against them. And if in any material respect they and the bank *fraudulently combined by or in that suit to deprive the debtor of any legal advantage, the least which can be done in Equity is to restore him to it.*

What is the answer to this view? *Not* that the demurrer does not in law admit the goodness of a further defence, and one not known at the judgment, and *likewise the existence of fraud* by those parties, but that the statement of the defence is not entitled to full credit, is contradictory and develops culpable neglect to enforce the defence, and that the fraud is not set out with sufficient detail.

But so far as regards the credibility to be given to the statement of the further defence in the bill, *that statement cannot be impugned on a demurrer.* The truth of it *can be doubted only* where a denial of it is made in an answer, or proof is offered against it, neither of which is now before us. * * * *

The present application being in Equity, and not at law a party to the former, is clearly entitled to an injunction if there was accident or mistake *or fraud in obtaining the judgment.* * * *

The *existence of fraud in obtaining the original judgment*, which is the other ground assigned for relief, is next to be considered. It is not

only alleged generally, but in the details so far as already specified in this opinion. *A general allegation of it in the bill would have been sufficient*, if so certain as to render the subject-matter of it clear. (*Nesmith et al, v. Calvert, 1 Wood and Minot, 44, Smith v. Burnham, 2 Sumner, 612, and Jenkins v. Eldidge, 3 Story R, 181*) *The demurrer admits the fraud as set out*, and the law is undoubted, that our jurisdiction in Equity extends over frauds generally, and in a special manner in one like this, to which it is doubtful whether any remedy existed by law, when defending the original action. *2 Caine's Cases in Error, 1. 10 John, 587. 1 Paige Ch. 90, 2 Stuart 420.*

* * * * * * * * * * * * *

Any assignment or other proceeding got up with the fraudulent intent of preventing the exercise of that right, as is here alleged and admitted, cannot receive the countenance of the Court.

But we do not decide on the extent to which at law such a defence can be made in Mississippi, or in respect to the manner of paying the balance, *as all our conclusions here rest entirely on the averments and the admission of their correctness by the demurrer.*

Davis v. Tileston, 6 How. U. S. Rep., 114-121.

In *Atkins vs. Dick, 14 Peters, 114*, it was said:—

"The bill further charges the defendants with *fraud*, and this too is admitted by the demurrer. If there be any one ground upon which a Court of Equity affords relief with more unvarying uniformity than any other, it is an allegation of fraud, whether proven or admitted. Whilst therefore, a case stands before us upon such a bill and demurrer, we cannot hesitate to say, it must be considered as entitling the party to the aid of a Court of Equity."

"Where fraud is alleged in a bill and relief is prayed against a judgment and judicial sale of property, a demurrer to the bill, that relief can be had at law is not sustainable."

Shelton vs. Tiffin, et. al., 6 How., 163.

"A Court of Equity only can give it." *McLean, J. Ib. p. 185.*

"The most solemn transactions and judgments may, at the instance of the parties be set aside or rendered inoperative for *fraud*. * * * The Court of Chancery is always open to hear complaints against it, whether committed *in pais*, or in or by means of judicial proceedings. In such cases the Court does not act as a Court of Review, nor does it inquire into any irregularities or errors of proceeding of another Court; but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it. (*Story's Eq. Jur., § 1570-1573; Kerr on Fraud and Mistake, 352-353. Gaine's vs. Fuentes, 92 U. S., 10. Barrow vs. Hunter, 92 U. S., 80.* * * * If the proceedings are tanta-

mount to a Bill in Equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding. * * * A new case arising upon new facts, although having relation to the validity of an actual judgment or decree, &c."

Curia, per *Mr. Justice Bradley* in *Johnson vs. Waters, 111 U. S., 640.*

In *Bryan vs. Kales, 134 U. S.. 126*, no words charging fraud *eo nomine*, were used, but facts were alleged, which this Court held, if proved, made *a case of fraud*, and therefore the Court below had erred in sustaining a demurrer to the bill and "in holding that the complainant failed to show that the plaintiff was entitled to relief from a Court of Equity."

POINT SECOND.

The facts alleged by the Bill and admitted by the Demurrer, show a clear Equity for the relief, and consequent Equity for the discovery prayed by the Complainant.

Defendant, Daniel C. Stelling, by his pleading, admits:—

(1.) That the judgment obtained in the United States Circuit Court for the District of South Carolina, by him against D. R. Smith & Company, under which the real and personal estate of that firm and the individual property of D. R. Smith was levied upon and sold, at a sacrifice, to Thomas R. McGahan, was suffered by said D. R. Smith in favor of the plaintiff in the action, Daniel C. Stelling, *by collusion* on the part of Smith with said Stelling, and *with a view to the protection of the property of said D. R. Smith against his other creditors and to defeat their claims.*

In *Beattie vs. Pool, 13 So. Ca. Rep., 379*, the Circuit Court held:—

"That even admitting that the note was based on a sufficient consideration to make it a valid debt, so far as the rights of other creditors are concerned, the *intent* to use even such a debt to *defeat* other creditors, makes the confession of judgment fraudulent and void as to them."

On appeal the Appellate Court said:—

"It is admitted that the judgment was confessed by the father to his son with intent to defeat, delay and hinder other creditors, but it was insisted that it was *not fraudulent*, because it was based upon what

purported to be a valuable consideration. * * * But when such intention is proved or admitted, we agree with the Circuit Judge that even admitting the note was based on sufficient consideration the intent to use it *to defeat other creditors* makes the confession of judgment void as to them."

(Citing *13 Eliz. c 5, and So. Ca. Cases*) See also *Roe vs. Harrison, 14 S. C., 625.*

The same rule which governs fraudulent conveyances controls judgments confessed or *suffered* by collusion with intent to defeat creditors.

"In *Cowper, 434*, Lord *Mansfield* said, the Statutes of *13 and 27 Eliz.*, could not receive too liberal a construction, or be too much extended in suppression of fraud; and it is now perfectly well settled, that every kind of fraud is equally cognizable at law as in equity. In *Twyne's* case, (*3 Co. Rep. 82.*) it is said to have been resolved by all the Barons 'that the Statute of 13 Eliz., c. 5, extends not only to creditors, *but to all others who had cause of action or suit* or any penalty or forfeiture.' "

Jackson vs. Myers, 18 Johns. 425.

"Judgments as well as grants obtained by fraud or collusion are void, and confer no vested title." (Mr. Justice *Grier* in)

League vs. De Young, 11 How, on p. 203.

"The District Court erred in overruling the evidence offered by the defendant to prove fraud in the judgments, executions, Sheriff's sale and Sheriff's deed."

"When a judgment is brought collaterally before a Court as evidence, it may be shown to be void upon its face by a want of notice to the person against whom judgment was entered, *or for fraud.*"

Webster vs. Reid, 11 How, 437.

(2.) The defendant, Daniel C. Stelling, by his demurrer, further admits:

"That the causes of action upon which said judgment against D. R. Smith & Co. purports to have been recovered were one promissory note and eight drafts for several amounts respectively, signed by D. R. Smith & Co., and payable to the order of J. C. H. Claussen & Co., the members of which firm were all at the time when the action was commenced citizens of the State of South Carolina, and of the same State with the defendant in said a tion, David R. Smith.

"That the complaint in said action does not show that the promissory note and drafts sued on were negotiable by the law merchant; does not show when said note and drafts were endorsed by the payees to Daniel C. Stelling, the plaintiff therein, whether before or after maturity; does

not show that it was not endorsed after maturity, and after said promissory note and drafts had ceased to be negotiable by the law merchant; does not show the names of the members of the firm of J. C. H. Claussen & Co. the payees of said note and drafts, nor their citizenship, nor that when said action was brought and judgment taken the members of said firm were citizens of a State other than the State of South Carolina, of which State the drawer, David R. Smith, the defendant who was sued, was a citizen."

The demurrer further admits:

"That jurisdiction in the Circuit Court of the United States was attempted to be obtained by the plaintiff in said action by suppressing the fact that the payee of said note was a citizen of the same State with the maker thereof, who was the defendant in said suit."

The force and effect of these admissions is, that they disclose the fact that the judgment in favor of Daniel C. Stelling against D. R. Smith & Co., under which the property of that firm was sold, was obtained by collusion and fraud on the part of both the plaintiff and defendant in the action. If voidable, the judgment, levy and sales should be set aside.

The admissions disclose the fact, that the Circuit Court was misled into taking cognizance of the suit, and was grossly and fraudulently imposed upon in rendering judgment in the action.

The admissions, however, go further. They show that *the Court never had jurisdiction of the action*, that the payee of the note and drafts was, at the time when the action was brought, a citizen of the same State with the maker thereof, who was the defendant in said suit, and that that fact was fraudulently suppressed by the plaintiff therein, Daniel C. Stelling, *for the purpose* of obtaining jurisdiction in the Circuit Court of the United States.

Daniel C. Stelling must, upon his admissions of the fraud charged in the bill, be held to have falsely held himself out as the owner of the note and drafts, by title acquired before maturity of the paper, when in truth he had not so acquired title, and was not the owner thereof, and as such entitled to sue D. R. Smith & Co. in the United States Court.

If he had been the true owner, had acquired title by purchase of the note as a promissory note negotiable by the law merchant, that is, before maturity, he would have had no occasion

for *attempting to obtain* jurisdiction by *suppressing the* jurisdictional *fact* that *the payee of said note was a citizen of the same State with the maker thereof, who was the defendant in said suit.*

The necessary conclusion of the Court must be that when Stelling brought his action and obtained his judgment against D. R. Smith & Co., he knew that he was not the owner and payee of the note, and that the original payee, the firm of J. C. H. Claussen & Co., the members of which were all, as is admitted, citizens of South Carolina, of the same State with the defendant, D. R. Smith, were the real owners.

The necessary authority for the Circuit Court to take jurisdiction of the action, and to render the judgment was, therefore, wholly wanting, and it was a case in which the Circuit Court, being imposed upon, innocently acted without authority.

"Where a Court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other Court. *But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void.*"

Elliott vs. Perisol, et al, 1 Peters, 328-340.

The above language of Justice Trimble, in that case, is quoted by Mr. Justice Bradley in the case of *Thompson vs. Whitman, 18 Wallace, on p. 467*, who adds:

"The same views were repeated in *The United States vs. Arredondo, (6 Peters, 691); Vorhees v. Bank of the United States, 10 Peters, 449; Wilcox v. Jackson, 13 Peters, 511; Shivers, Lessee v. Lynn, 2 How, 59, 60; Hickeys Lessee, v. Stewart, 3 Howard, 762, and Williamson v. Berry, 8 How., 540.*

The Act of Congress of March 3, 1875, Sec. 1, C. 137, (18 Stat., pt. 3. p. 470), declares:

"That if in any suit commenced in a Circuit Court * * * * it shall appear to the satisfaction of the said Circuit Court at any time after such suit has been brought, * * * * that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable * * * under this Act, the said Circuit Court shall proceed no further, but shall dismiss the suit, * * &c."

The Act directs what the Circuit Court shall do; it says nothing of the Supreme Court. Nevertheless, this Court did not hesitate to act (in *Willliams v. Nottawa, 104 U. S., 209*) upon a case of collusion "done for the purpose of creating a case" in the United States Court, and to "stop all further proceedings and dismiss the suit."

As the power of this Court to dismiss the suit is not to be found in the words of the Act, we presume it must be referred to its general power to protect itself and inferior Courts from the imposition of parties obtaining jurisdiction by fraud.

As was said by Chief Justice Waite, in *Hartog v. Memory, 116 U. S. 588*:

> "Beyond this, no doubt, if from any source the Court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once of its own motion cause the necessary inquiry to be made, either by having the proper issue joined and tried or by some other appropriate form of proceeding, and act as justice may require for its own protection."
>
> See also *Conwell v. Canal Co., 4 Bissel 195 Freeman v. Howe, 24 How. 450. Minn & Co. v. St. Paul Co., 2 Wall, 209.*

So we assume that the Courts will feel impelled to set aside any judgments or proceedings obtained by fraud or collusion in any case properly before them, wherein it has been proven that parties have fraudulently suppressed the jurisdictional facts for the purpose "of creating a case cognizable in the United States Courts," where the judgment or proceedings are properly attacked for fraud, *not* by either of the parties to the suit who participated in misleading the Court by omitting to make the fact (of citizenship) "known at the time," as in *Hartog v. Memory*, *but* by third persons, who are injuriously affected by the judgment so obtained as in this case.

So we contend that having the judgment in the case of *Daniel C. Stelling v. D. R. Smith & Co.*, before it, under this bill, with the specific charges of fraud set forth, and with the admissions of the defendant, Stelling, it was the duty of the Circuit Court to have declared the judgment together with the levy and sale by the United States marshal under it, to be null and void.

Cushman v. Amador and Canal Co., 118, U. S. 58.

(3.) We contend also that the Circuit Court should have looked into the record in that case, and noticed the other facts as they stand admitted, besides those of collusion and fraud, namely, that the record therein wholly fails to show the matters essential to the jurisdiction of the Court, and its authority to render the judgment and permit the levy and sale.

These facts are:

(a.) That the record does not show that the promissory note sued on was negotiable by the law merchant.

(b.) That the record does not show when said note and drafts were endorsed by the payees to Daniel C. Stelling, the plaintiff therein.

(c.) That the record does not show that they were *not* endorsed after maturity, and after said promissory note and drafts had ceased to be negotiable by the law merchant.

(d.) That the record does not show the names of the members of the firm of J. C. H. Claussen & Co., the payees of said note and drafts, nor their citizenship, nor that when said action was brought and judgment taken the members of said firm were citizens of a State *other than* the State of South Carolina, of which State the drawer, David R. Smith, the defendant, who was sued, was a citizen.

(a,) (b) and (c.)

It was essential that the record should show that the promissory note sued on was negotiable by the law merchant.

"It was settled at a very early day that the facts on which the jurisdiction of the Circuit Courts rest must in some form appear on the record. (*Turner v. Bank of North America, 4 Dall 8. Bushnell v. Kennedy, 9 Wall 387; Hornthall v. Colleton, 9 Wall, 560. Ex-parte, Smith, 94 U. S. 455. Robertson v. Cease, 97 U. S. 646. Grace v. American Central Ins. Co., 109, U. S. 278, 283. Bois v. Preston, 111 U. S 252, 255. Mansfield Coldwater and Lake Michigan Railway v. Swan, 111 U. S. 379, 382. Hancock v. Holbrook, 112 U. S. 229.*"

By Mr. Chief Justice Waite for the Court in *Continental Ins. Co. v. Rhodes, 110 U. S. 239.*

And it is error for a Court to proceed without its jurisdiction is shown. (*Grace vs. American Central Insurance Co., supra; Thayer vs. Life Association, 112 U. S., 717; Mansfield &c., Railway vs. Swan, supra.*) Ib. 230.

"**And, besides, the jurisdiction must appear positively. It is not enough that it may be inferred argumentatively.** (*Brown vs. Keene, 8 Pet., 112. Robertson vs. Cease, supra.*") Ib. 251.

"**The fact essential to give jurisdiction must appear somewhere in the record.**"

Railway Co. vs. Ramsey, 22 Wall, 322.

Sec. 1 of the A. C., 1875, (supra) repeats the law of 1789, thus:—

"**Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such Court to recover therein if no assignments had been made.**"

And it adds the following exception:—

"**Except in case of promissory notes, negotiable by the law merchant and bills of exchange.**"

Not all promissory notes, but only such as are "*negotiable by the law merchant*," are excepted from the prohibitory rule as to suit by assignees.

Judge Gresham in *Gregg vs. Weston, et. al., 7 Bissell's Reports*, held, that "Congress meant by this language" (a promissory note, &c.,) "notes having the qualities of notes negotiable by the law merchant, namely:—notes which, *in the hands of a bona fide purchaser for value before maturity, were subject to no equities in favor of the maker.*"

If, in the case of *Daniel C. Stelling vs. D. R. Smith & Co.*, the promissory note upon which that action was brought in the United States Circuit Court for South Carolina, was *past due*, when it was assigned by J. C. H. Claussen & Co., to Stelling, and if Stelling was not a *bona fide purchaser thereof for value, before maturity*, it was in his hands as assignee, clearly *not* "a promissory note, negotiable by the law merchant," and therefore *not* within *the exception*, in favor of such notes, by the last clause of Sec. 1, of A. C., 1875. It falls under the prohibition, enacted by that clause, against all other contracts held by assignment, cognizance of which by the Circuit and District

Courts of the United States is forbidden in favor of an assignee.

In interpreting the Statute of 1875, the rules of strict construction apply. In the first place, it is a Statute creating, as to suits on promissory notes, a new jurisdiction, one which did not exist in the U. S. Circuit and District Courts under the previous law.

"A Statute creating a new jurisdiction ought to be construed strictly."
Dwarris on Statutes, 652.

Again, this *exception* is like a *proviso* in a statute, of which it is said :

"Where it follows an enacting clause general in its scope and language, *it is be strictly construed*, and *limited* to the objects fairly *within its terms*."

Endlich on Interpretation of Statutes, § 166, p. 257.

In the *U. S. vs. Dickson, 15 Peters, on p. 165*, Judge Story said :

"We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statute, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and *takes no case out of the enacting clause* which does not fall fairly within its terms."

The object of the enacting clause of the A. C. 1875, being to prohibit suits in United States Courts generally on contracts in favor of an assignee, whose assignor could not sue in such courts, the exception or proviso, "except in cases of promissory notes negotiable by the law merchant," is to be construed strictly, and "takes no case out of the enacting clause, which does not fall fairly within its terms," that is to say, allows no suit by an assignee of a promissory note not "negotiable by the law merchant," nor payable to order and transferable by endorsement. No suit on a promissory note, assigned after maturity, nor on a note in the hands of one *not a bona fide* purchaser for value before maturity.

It was obligatory on Daniel C. Stelling, the plaintiff, in the action against D. R. Smith & Co. to bring himself upon the

record clearly within the terms of the exception in the statute, and to show affirmatively on the record that he was the *bona fide* owner by endorsement before maturity and for value of the promissory note sued on.

The demurrer admits that the record fails to show that the promissory note sued upon was negotiable by the law merchant; fails to show that the note endorsed to him as a *bona fide* holder for value before maturity, does not show that it was not assigned after maturity, and after its negotiability by the law merchant had ceased.

(d.) Failing to bring the action within the case contemplated by the exceptions in the 1st Sec. of the A. C., 1875, *i. e.*, a promissory note negotiable by the law merchant, it was then incumbent on the plaintiff, Stelling, to show upon the record that his assignors, (omitted) have sued in the United States Courts, that is, that they were all citizens of a State other than the State of South Carolina, of which the defendant, D. R. Smith & Co., the maker of the note, was a citizen.

The demurrer admits, that the record fails to show the name of the members of the firm of J. C. H. Claussen & Co., the payees and assignors of the note, and does not show their citizenship, nor that when the action was brought and the judgment taken, they were citizens of a State *other* than that of which the defendant, D. R. Smith, was a citizen.

On these grounds, if no other, the demurrer should have been overruled.

(4.) *The further fraud charged in the bill, and admitted by the demurrer, set forth in assignments of error, (g) and (h,) entitled complainant to the relief prayed for. (Record, p. 16, fols. 51, 52, 53.)*

It appears, (*Record, pp. 1 and 2, fols. 3 and 4,*) that simultaneously with the collusive and fraudulent judgment obtained by Daniel C. Stelling, and suffered by D. R. Smith, above discussed, and in concert with said Stelling, a summons and complaint was filed and served on said David R. Smith, at Charleston, S. C., in the name of M. Brown Sons & Co., citizens of Pennsylvania, and judgment taken by default against D. R. Smith & Co., and suffered to be taken by said D. R. Smith in favor of said last named plaintiffs on one promissory note,

signed by D. R. Smith & Co., payable to the order of Edwin Bates & Co., all of the members of which firm were at the time said action was begun and said judgment taken, citizens of the State of South Carolina, the same State as that of D. R. Smith, defendant in said action.

That said judgment (*Record p. 2, fol. 4*) was obtained by M. Brown Sons & Co., (or in their names) and suffered by D. R. Smith, *by collusion* with said plaintiffs and *with a view to the protection of the property of the said D. R. Smith against his other creditors and to defeat and defraud them* of their just rights, and that *jurisdiction* in the Circuit Court of the United States was *attempted to be obtained* by the plaintiff in said action *unlawfully and by suppressing the fact* that the payees and alleged endorsers of said note and drafts were citizens of the same State with the makers and drawers thereof, who were defendants in said action.

The bill further alleged (*Record p. 3, f. 6*) and the demurrer admitted that *executions* upon *both* of said *judgments* were *issued simultaneously*, directed to the United States marshal for the District of South Carolina, and entered on the same day April 28, 1885, in his office; that said executions were levied upon the partnership property of said D. R. Smith & Co., on same day, April 30, 1885, three days after judgments were obtained, that property of D. R Smith & Co., consisting of a steam saw mill, engines, &c., valued at not less than thirty thousand dollars was sold at a great sacrifice for the nominal sum of three or four thousand dollars to Thomas R. McGahan, as purchaser thereof, who is a member of the firm of Edwin Bates & Co, the payees and real owners of the note and drafts sued upon in the name of M. Brown Sons & Co., (*Record p. 4, fol. 7.*) that the real estate of said D. R. Smith & Co., and the separate property of D. R. Smith was levied upon under said judgments and sold by the U. S. marshal for the sum of $3,850, an amount far below its real value, on the 7th September, 1885, at Kingstree, in the State of South Carolina, to the same Thomas R. McGahan; that settlement was said to have been made by said Thomas R. McGahan in the marshal's office, at Charleston, S. C., *on the same day* on which it was sold by the said marshal at Kingstree, S. C., and a deed of conveyance, dated on same

day, delivered to said Thomas R. McGahan by said marshal; that property valued at not less than $30,000 was ostensibly sold for about one-tenth its value.

That immediately after the sale, Mrs. E. P. Smith, the wife of D. R. Smith, was, by the said Thomas R. McGahan, put in possession of the real and personal property so sold and has been using the same from the sales day in June 1885, to the date of the filing of the bill of complaint herein, and has been in the actual perception of the rents and profits thereof, in collusion with her husband and said Thomas R. McGahan.

The bare recital of the above facts is sufficient, without need of comment, to establish a case for relief and discovery.

"Fraud," said Mr. Justice Story, "will vitiate any, even the most solemn transactions; and an asserted title to property founded upon it is utterly void."

The United States v. The Amistad, 15 Peters, 594.

Theodore G. Barker.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1894.

No. 113.

THE NATIONAL BANK OF RONDOUT, NEW YORK,
APPELLANT.

vs.

DAVID R. SMITH, IN HIS OWN RIGHT, AND AS SURVIVING PARTNER OF D. R. SMITH & CO., ET. AL., RESPONDENTS.

Appeal from the Circuit Court of the United States, for the District of South Carolina.

ARGUMENT FOR DANIEL C. STELLING, Appellee.

I.

STATEMENT OF CASE.

The Complainant, the Appellant, filed a Bill in Equity in the United States Circuit Court, for the District of South Carolina, to set aside certain judgments recovered by Daniel C. Stelling and others, against D. R. Smith & Co., and also to set aside the sale of certain property of the defendants, D. R.

Smith & Co., made under the executions issued on said judgments, and thereafter to apply the real property of the said D. R. Smith & Co., so sold under the said judgments, to the payment of a claim held by the complainant, the National Bank of Rondout, and the claim of the other creditors of D. R. Smith and D. R. Smith & Co. To this bill, the defendant, Daniel C. Stelling, filed a demurrer for want of equity, and on a hearing in the Circuit Court, this demurrer was sustained, and this appeal is from the Order sustaining the demurrer.

II.

POINTS OF LAW.

The questions raised by the demurrer and sustained in favor of the Appellee by the Court below, are as follows :—

1st. That the Bill of Complaint alleges no ground for equitable interference, in that it does not allege that any execution has ever been issued upon the judgment held by the Complainant and returned unsatisfied. That it does not allege that there are no assets of the defendant, D. R. Smith & Co., subject to an execution at law; nor does it allege that the defendant, D. R. Smith, and the members of the firm of D. R. Smith & Co., the judgment debtors of the Complainant, are insolvent or not able to pay the judgment at law.

2nd. That the Bill of Complaint alleges no sufficient ground for setting aside the judgment recovered by the defendant, Daniel C. Stelling, against the firm of D. R. Smith & Co., in that although the said Bill of Complaint charges in general terms that the judgment recovered by the Appellee, Daniel C. Stelling, was recovered fraudulently and by collusion, yet the only facts upon which such charges of fraud and collusion are based as alleged, are that the said judgment recovered by the defendant, Daniel C. Stelling, was recovered upon certain promissory notes and drafts or Inland Bills of Exchange, the original payees wherein were citizens of the State of South Carolina, which fact was not alleged in the proceedings insti-

tuted by the said Daniel C. Stelling, to recover judgment and which would have defeated the Circuit Court of the United States of any jurisdiction to award judgment in favor of Daniel C. Stelling, the holder of said promissory notes and bills of exchange, against the defendants, D. R. Smith & Co., and further, that said judgment was recovered by default.

PROPOSITION FIRST.

That the Bill of Complaint herein cannot lie without execution first issued and returned unsatisfied.

An analysis of the bill shows only the following allegations:—

That the complainant, the National Bank of Rondout, is a judgment creditor of the firm of D R. Smith & Co.; that a certain number of other creditors, including Daniel C. Stelling, had recovered judgments in the Circuit Court of the United States, for the District of South Carolina, against the firm of D. R. Smith & Co., and D. R. Smith; that such judgment of Daniel C. Stelling had been unlawfully obtained by suppressing the fact that the same had been recovered upon promissory notes and drafts or Inland Bills of Exchange, the first payees named wherein were citizens of the State of South Carolina; that such judgment had been allowed by the defendant, D. R. Smith, to have been recovered against him by default; that execution had been issued on the judgment held by Stelling and the other judgments, and levied upon certain partnership property of D. R. Smith & Co., in the State of South Carolina, which had been thereafter sold at public auction by the United States Marshal, to Thomas R. McGahan, one of the defendants for less than its real value; and on these facts the bill prays that all these judgments be set aside, the execution sale annulled, and the property of D. R. Smith & Co., applied to the payment of their creditors secured and unsecured. There is no allegation in the bill whatever, that D. R. Smith & Co., and the individual co-partners, to-wit:—D. R. Smith and Walter B. Crane, are insolvent, and without

assets subject to execution. There is no allegation that execution has ever been issued upon the judgment recovered by the complainant against the firm of D. R. Smith & Co., and returned unsatisfied, or that the issue thereof would be fruitless because there are no assets on which the same could be levied. Under these circumstances, we submit, by the settled rule of proceedings in equity in the Circuit Courts of the United States, no bill can be filed by a creditor to subject equitable assets to the payment of a judgment until the execution has been first issued and returned unsatisfied, or with such other allegations as show the issuance of an execution would be wholly fruitless.

The general rule is stated in the case of *Jones vs. Green*, 1st Wallace, p. 330, where it was decided by the Court that a bill in equity will not lie on behalf of judgment creditors, to subject real property of their debtor held by a third party upon a secret trust for him to the satisfaction of their judgment, until a fruitless attempt has been made for its collection by execution at law. The principle of this case has been repeatedly affirmed, even as late as the case of *Scott vs. Neely*, 140 U. S., p. 113, and modified only by the principle announced in *Case vs. Beauregard*, 101 U. S., p. 688, where this Court held that a judgment and fruitless execution are only evidence that legal remedies have been exhausted. They are not the only possible means of proof, and that where it appears by the bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference. In *Taylor vs. Bowker*, 11th U. S., p. 116, this Court say:

"When an attempt is made by a process in equity to reach equitable " interests, choses in action or the avails of property fraudulently con- " veyed, the bill should state that judgment has been obtained, and " that execution has been issued, and that it has been returned by the " officer without satisfaction."

In *Van Weel vs. Winston*, 115 U. S., p. 245, in a case of a bill brought by an unsecured creditor of a corporation, to compel

the return to the corporation of moneys fraudulently converted away from it, the Court say:

"As a creditor of the Company Mr. Van Weel has no right to interfere in the matter until he has a judgment against the Company with an execution returned *nulla bona*."

The same is the rule of practice in the State Courts of South Carolina as enforced by its Supreme Court in the case of *Compton vs. W. J. Patterson*, 28 So. Ca., 152. There the Supreme Court of South Carolina considering and referring to the previous cases, held that an action to subject to the debts of a party a tract of land alleged to be held by a third person but to be subject to the payment of the debts of the debtor, cannot be maintained until after a return of *nulla bona* to an execution. The bill of complaint in the case before the Court, therefore, contains no sufficient allegations from which it can appear that the firm of D. R. Smith & Co., and the individual co-partners therein, have no property applicable to any execution that may be issued upon the claim of the complainant, appellant herein, and no sufficient ground for equitable interference is shown by the bill, and the same was properly dismissed.

PROPOSITION SECOND.

That the bill in itself alleges upon the merits no ground of equity against the defendant, Daniel C. Stelling.

The bill alleges in general terms fraud and collusion between the defendant, D. R. Smith and the defendant, Daniel C. Stelling, in the recovery of this judgment; but we take it that there can be no doubt that in a bill of equity mere general charges of this kind are of no effect. The bill must state the facts from which the complainant infers the charges as made.

In *Ambler vs. Choteau*, 107 U. S., p. 591, the Court says:

"No case has been made by the loose and general allegations in this bill for relief against these defendants. The words 'fraud' and "conspiracy" alone, no matter how often repeated in a pleading, can-

" not make a case for the interference of a Court of Equity. Until con-
" nected with some specific act, for which one person is in law respon-
" sible to another, they have no more effect than other words of unpleasant
" signification. While in this case the offensive words are used often
" enough, the facts to which they are applied are not such as to make
" the defendants answerable to the complainant for the damages and
" other relief he asks."

And again, in the case of *Van Weel vs. Winston*, 115 U. S., p. 227, this Court says with reference to the bill of complaint:

"It is full of the words fraudulent and corrupt, and general charges of
" conspiracy and violation of trust obligations. Mere words in and of
" themselves, and even as qualifying adjectives of more specific charges,
" are not sufficient grounds of equity jurisdiction unless the transactions
" to which they refer are such as in their essential nature constitute a
" fraud or breach of trust for which the Court of Chancery can give
" relief."

See to the same effect *Story's Equity Pleadings*, (10th Edition,) Sec. 251, and *Daniel's Chancery Practice*, (5th Am. Edition,) Vol. 1, p. 324.

The only two charges in the present bill of complaint on which relief is sought against the defendant, Daniel C. Stelling, are, first, that his judgment was recovered on certain negotiable instruments, the first payees named wherein were not alleged in the proceedings by Daniel C. Stelling, to be citizens of a different State from the defendant, D. R. Smith; and second, that D. R. Smith suffered the judgment to be recovered by default. Taking up the first of these charges, to state it concretely, the bill alleges that D. R. Smith & Co., of which firm D. R. Smith was a citizen of South Carolina, made certain negotiable instruments payable in the first instance to J. C. H. Claussen & Co., also citizens of South Carolina. That thereafter Daniel C. Stelling, a citizen of Georgia, recovered judgment in the Circuit Court of the United States for the District of South Carolina against D. R. Smith & Co., upon these negotiable instruments, which had been endorsed to him, but without alleging in his proceedings for the recovery of such judgment, that the said firm of J. C. H. Claussen & Co., was composed of citizens of a different State from the State of

South Carolina, whereas, in fact, the members of that firm were all citizens of South Carolina. This point is evidently based upon a misconception by the complainant of the Act at that time in force, defining the jurisdiction of the Circuit Courts of the United States. The judgment recovered by Daniel C. Stelling was recovered on the 27th of April, 1885, when the provisions of the Act of 1875, defining the jurisdiction of the United States Circuit Courts, were in force. The words of that Act are:

"That no civil suit shall be brought in such Courts, founded on contract, in favor of the assignee, unless a suit might have been prosecuted in such Court to recover thereon, if no assignment had ever been made, *except in cases of promissory notes negotiable by the law merchant and bills of exchange.*"

Under this Act it has been repeatedly adjudicated by this Court, that in the case of promissory notes negotiable by the law merchant, and bills of exchange, a Circuit Court of the United States had jurisdiction, if at the time of suit brought, the holder of the same was a citizen of a different State from the maker, although the first payee by whom the bill had been endorsed to the holder was a citizen of the same State with the maker. In *Allen vs. O'Donald*, 28 Fed. Rep., p. 17, it was held, that a promissory note payable to order or bearer, is negotiable as long as it exists unpaid, and the endorsee or assignee thereof may, under the Judiciary Act of 1875, sue thereon in the United States Circuit Court without reference to the citizenship of his endorsor or assignor; and the principle of that case is held in the case of *Shaw vs. R. R. Co.*, 101 U. S., p. 563. And again, in *Ackley School District vs. Hall.* 113 U. S., p. 135, it is held, that if a promissory note, bill of exchange or other instrument is expressed in words of negotiability, the right of the holder of the legal title under the Act of 1875, to invoke the jurisdiction of the proper Circuit Court of the United States, is not affected by the citizenship of any prior holder, or by the circumstance that the party sued asserts, or is able to make out a valid defence to the action.

It was contended in that case that when an instrument negotiable by the law merchant was transferred after its maturity by the original payee to a third person, the holder

could not bring an action thereon in the Federal Courts against the maker, unless the original payee could have done so; because its negotiability having ceased with its maturity, the subsequent transfer was an assignment of a chose in action, jurisdiction of which in the Federal Courts, in the hands of the assignee, depended upon jurisdiction in the hands of the assignor.

This Court held otherwise, and say on page 141 :—

"Such is not the test prescribed by the Statute, defining the jurisdic-
" tion of the Circuit Courts of the United States. If a promissory note is
" expressed in words of negotiability, the right of the holder of the legal
" title to invoke the jurisdiction of the proper Circuit Court of the United
" is not affected by the citizenship of any prior holder, or by the circum-
" stance that the party sued asserts, or is able to make out, a valid defense
" to the action."

These authorities effectually dispose of the charge that jurisdiction in this case was improperly obtained by Daniel C. Stelling in the Circuit Court of the United States for the District of South Carolina, because of his failure to allege that his endorsers were not citizens of the State of South Carolina.

The only other fact alleged as the basis for the charges of fraud and collusion is, that D. R. Smith suffered judgment to go against him in favor of Daniel C. Stelling by default. There is no allegation in the bill of complaint that D. R. Smith & Co. did not fairly and honestly owe to Daniel C. Stelling the amount sued for and recovered by him; or that there was any defence on the merits thereto. On the contrary, the presumption is that it was in all respects a fair and honest debt. If it was a fair and honest debt, D. R. Smith was not only to be commended for not interposing a defence where he had none, but his action in interposing a defence to such a debt would be the subject of the reprobation of the Court rather than the foundation of a charge for fraud. In the case of *White vs. Crow*, 110 U. S., p. 183, a bill was filed by a third party to set aside a judgment recovered, because, first, it had been fraudulently obtained; and second, because the Court was without jurisdiction to render it—the very grounds relied upon in the

case now before the Court. In passing upon the charge that the judgment was fraudulently obtained, the Court say, p. 187:

"We have been unable to find in the record any support for the contention that the judgment was fraudulently obtained. * * If the Brittenstine Silver Mining Co. were itself assailing the judgment as fraudulently procured, it could *not* have enjoined in equity, unless it could aver and prove that it had a good defence upon the merits. * * There is no pretense that the Company had any defence. * * Much less, therefore, does it lie in the mouth of appellant to complain of fraud in the obtaining of the judgment. On this point he has no standing in the Court."

And proceeding further upon the question that the Court had no jurisdiction, the Court held that where a Court has jurisdiction to render a judgment, and has rendered it, the law, when the judgment is collaterally attacked by a third person, will make all presumptions necessary to sustain it, and quote with approval the words of this Court, in *Cooper vs. Reynolds*, 10th Wallace, p 316:

"It is of no avail to show that there are errors in the record, unless they be such as prove that the Court had no jurisdiction of the case, or that the judgment rendered was beyond its power. This principle has been often held by this Court, and by all Courts; and it takes rank as an axiom of law."

And the Court proceeds to add:

"The judgment therefore cannot be declared void. It could not be successfully attacked in this collateral way, even by the defendant, much less by one not a party to it. We must assume the judgment to be valid and binding until reversed in a direct proceeding."

Finally, in the case of *ex-parte Cuddy*, 131 U. S.. p. 265, it is held that the general rule that unless the contrary appears from the record, a cause is deemed to be without the jurisdiction of a Circuit or a District Court of the United States, the jurisdiction being limited by the Constitution and Acts of Congress, has no application where the judgments of such Courts are attacked collaterally. Unless, therefore, the want of jurisdiction as to subject matter or parties appears in some proper form, every intendment must be made in support of the judgment of a Court of that character.

HENRY A. M. SMITH.

SUPREME COURT OF

OCTOBER TERM

No. 113

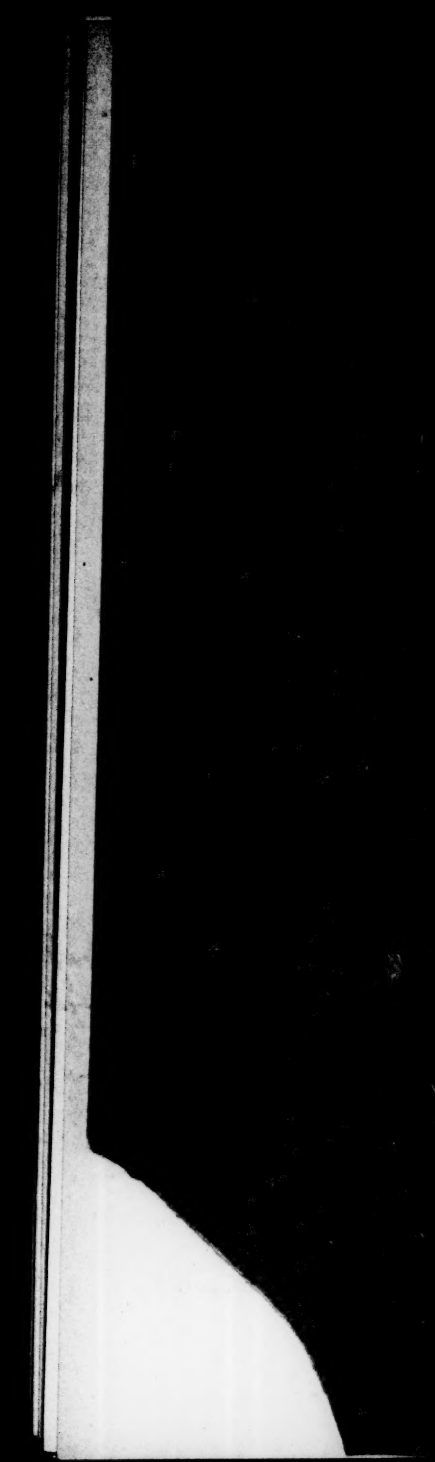
Appeal from the Circuit Court of the United States for the District of South Carolina.

THE NATIONAL BANK OF ROND[illegible],
APPELLANT,

vs.

DAVID R. SMITH, IN HIS OWN RIGHT AND AS
COPARTNER OF D. R. SMITH & CO.,

Reply of Theodore G. Barker, for The [illegible] and, Appellant.



Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 113.

Appeal from the Circuit Court of the United States for the District of South Carolina.

THE NATIONAL BANK OF RONDOUT NEW YORK.
APPELLANT.

vs.

DAVID R. SMITH, IN HIS OWN RIGHT AND AS SURVIVING COPARTNER OF D. R. SMITH & CO., ET AL. APPELLEES.

Reply of Theodore G. Barker, for The National Bank of Rondout, Appellant.

I.

Appellee's Statement of the Case is incorrect.

The appellant dissents from the statement of the case as presented by appellee in his Brief, in that it limits and wholly understates the scope of complainant's bill, both as to its allegations and prayer.

The allegations of the bill set forth a scheme of fraud between defendants originating in the procuring by certain creditors of

D. R. Smith & Co., and the suffering by D. R. Smith, assuming to represent the firm, of two judgments, suffered to be taken by default "by the said D. R. Smith in favor of the plaintiffs named therein by collusion with said plaintiffs and with a view to the protection of the property of said D. R. Smith against his other creditors and to defeat and defraud them of their just rights." P. 2, f. 4, p. 3, f. 6.

The entry of these two judgments on the same day. P. 1, f. 3. p. 2. f. 5. was followed by the simultaneous issuing of executions upon said judgments on the day following and the immediate levy two days after upon certain property real and personal, levied upon as the property of D. R. Smith & Co., p. 3, folio 6.

The bill alleges the sale under said levies of certain real and personal estate out of which complainant was entitled to be paid estimated to be worth not less than $3,000 at a great sacrifice for the sum of $3,850 and the purchase thereof by Thomas R. McGahan, one of the defendants charged as a party in collusion with David R. Smith, a pretended settlement in Charleston, S. C., by McGahan as purchaser on the same day as the sale made to him at Kingstree, S. C., and a conveyance to McGahan on the same day by the U. S. Marshal in Charleston, and that immediately after said sale Elizabeth P. Smith, the wife of David R. Smith, the man who had made the fraudulent and collusive confession of judgment, was put by McGahan, his confederate (as is charged), into the possession of the real and personal property so sold, under a lease, under which she and her husband had ever since been taking the rents and profits of the said lands. P. 4, ff. 6, 7, 8.

The bill alleges that The National Bank of Rondout, as owner of a judgment for $13,844.74, against D. R. Smith & Co., and D. R. Smith individually was "*Entitled to be paid out of the property of said firm*, and out of the *individual property of said David R. Smith*," P. 1. F. 3.

The bill also alleges, that in the case of each suit in which said fraudulent judgments were recovered, "jurisdiction in this Court of said action was attempted to be obtained by the plaintiffs in said action by suppressing the fact that the payee of the said note sued on," was a citizen of the said State with the maker thereof, *and that the said judgment by default was suffered*

by said D. R. Smith, in favor of the plaintiff named therein by collusion with said plaintiffs, and with a view to the protection of the property of said D. R. Smith, against his other creditors, and to defeat their just rights," p. 2, f. 4, p. 3, f. 6.

The prayer of the bill is that "said sales and the judgments under which they were made, and the deed or deeds of the United States Marshal purporting to convey the property sold be set aside and declared to be null and void," p. 5, f. 9.

That a receiver be appointed *to take possession of said property real and personal*, and to *collect the rents and profits thereof*, that D. R. Smith and Mrs. E. P. Smith, and Thomas R. McGahan, and all other persons who may be liable to account, account to said Receivers, that the property real and personal be eventually sold, and proceeds applied to *payment of the respective liens thereon according to their priority*, and that the unsecured creditors of D. R. Smith & Co., be paid out of the balance of the co-partnership property, and the creditors of the individual partner of said firm, out of the individual partner's personal and separate property.

That Thomas R. McGahan may be ordered *to surrender such title and possession*, as he may have acquired thereunder; that said D. R. Smith and Mrs. E. P. Smith may severally *surrender possession of said property, real and personal;* that said McGahan, Mrs. Smith and D. R. Smith may *discover and account for all the rents and profits*, during their possession, and may discover and account fully for any *waste and damage*, done by them or either of them since the same went into their control.

With specific interrogatories for discovery, directed to Daniel C. Stelling and the other defendants, p. 5, f. 9, 10, p. 6, f. 10.

The demurrer admits all of the above allegations of fraud and collusion and wrongful possession, obstructing the rights of Complainant.

II.

Points of Law.

It is not correct to say, as is said on p. 2, of Appellee's Brief, that

"The questions raised by the demurrer and sustained in favor of the Appellee by the Court below are as follows:

1st. That the Bill of Complaint alleges no ground for Equitable relief,

in that it does not allege that any execution has ever been issued upon the judgment held by the complainant, and returned unsatisfied. That it does not allege that there are no assets of the defendant D. R. Smith, & Co., subject to an execution at law; nor does it allege that the defendant D. R. Smith, and the members of the firm of D. R. Smith & Co., the judgment debtors of the Complainant, are insolvent or not able to pay the judgments at law."

No such causes of demurrer are expressed in the demurrer filed in this case, p. 10, f. 34.

The record discloses nowhere, as a cause of demurrer, or as a ground of the decree below, "that the bill does not allege that any execution has ever been issued upon the judgments held by the Complainant and returned unsatisfied," *or* "that it does not allege that there are no assets of the defendant D. R. Smith & Co, subject to an execution at law," or that it does not "allege that the defendant D. R. Smith and the members of the firm of D. R. Smith &. Co., the judgment debtors of the complainant are insolvent, or not able to pay the judgment at law."

In order to raise such questions, Defendant should have set them forth as expressed causes of demurrer in obedience to the ancient rule of the English Chancery that, "A demurrer must express the several causes of demurrer," *3 Madd., 8; 1 Jac. R., 467; Harrison vs. Hogg, 2 Ves. Jur., 323, and cases cited in appellant's brief.*

It cannot therefore be held, in this case, that these questions have been either raised by the demurrer or sustained in favor of the appellee by the Court below.

III.

Proposition First of Appellee's Brief (p. 3,) is not correct, viz: "That the Bill of Complaint herein cannot lie without execution first issued and returned unsatisfied."

This is not a case "in which the jurisdiction of a Court of Equity is invoked on the ground of the insolvency of the judgment debtor, or of the insufficiency of assets, or that the remedy at law afforded to the creditor is ineffectual to reach the property of the debtor," in which cases it would be necessary that a judgment creditor "should show that he had exhausted his legal remedy by an execution returned unsatisfied."

The case here is one where "the enforcement of his legal remedy is obstructed by some incumbrance upon the debtors property, or a fraudulent transfer of it."

In the case of *Jones vs. Green, 1 Wallace 330, relied on by appellee*, Mr. Justice Field uses this language, "a Court of Equity exercises its jurisdiction in favor of a judgment creditor only where the remedy afforded him at law is ineffectual to reach the property of his debtors, or, the enforcement of his legal remedy is obstructed by some incumbrance upon the debtor's property, or some fraudulent transfer of it."

In the first case, the Court "when its aid is invoked, looks only to the execution, and the return of the officer to whom the execution was directed." * * * *

In the second case, "it is to remove the obstructions, and thus enable the creditors to obtain the full price for the property, that the suit is brought," (*citing, Beck vs. Burdett, 1 Paige 307; McElwin vs. Willis, 9 Wendell 559, Capper vs. Hudson, 3 Keenan 164.*)

The case of *Scott vs Neely, 140 U. S. p. 113*, next cited by appellee contains no such proposition as is contended for here, viz: that in a bill for relief by a judgment creditor, as is sought in this case, it must be alleged that an execution has been issued and returned unsatisfied.

In *Scott vs. Neely*, it was said by Mr. Justice Field, "This is a suit in Equity to subject the property of the defendants to the payment of a simple contract debt of one of them in advance of any proceedings at law either to establish the validity and amount of the debt, or to enforce its collection. * *

At the outset of the case the question is presented whether a suit of this kind, where the Complainant is a simple contract creditor, can be maintained in the Courts of the United States.

It is sought to uphold the affirmative of this proposition on the ground that the Statutes, of Mississippi, create a new Equitable right in the creditor, which, being capable of assertion by proceedings in conformity with the pleadings and practice in Equity, will be enforced in those Courts."

It was held, that notwithstanding the Mississippi Statute, the right of trial by jury in suits at common law when the value in controversy shall exceed twenty dollars, is guaranteed by the

seventh amendment of the constitution, and cannot be dispensed with in the Federal Courts.

"In all cases where a Court of Equity interferes to aid the enforcement of a remedy, there must be an acknowledged debt, or one established by a judgment rendered, accompanied by a right to the appropriation of the property of the debtor for its payment; or to speak with greater accuracy there must be in addition to such acknowledged debt an interest in the property, *or* a lien thereon created by contract, *or* by some distinct legal proceeding." *Citing, Smith vs. R. R. Co., 99 U. S., 309, 401 and other cases.*) * *

"In *Wiggins vs. Armstrong*, Chancellor Kent held, that a creditor at large, or before judgment, was not entitled to the interference of a Court of Equity by injunction to prevent the debtor from disposing of his property in fraud of the creditor." * *

In none of these cases, is it said, that there must be "an execution issued and returned unsatisfied."

In the case at bar, complainant alleged, that he had recovered judgment and was entitled to be paid out of the property of the defendant and his firm; these allegations were admitted by the demurrer.

By the law of South Carolina (*Code of Procedure, Sec. 310 and 311—Acts of Assembly 1870, 1882 and 1885,*) it is declared that

"A final judgment recovered in any Court of this State subsequent to the 25th day of November, A. D., 1873, shall constitute a lien upon real estate of the judgment debtor in the county where the same is entered for a period of ten years from the date of entry thereof." * *

"The lien of judgments on property within the jurisdiction of the Federal Courts depends upon the State law." *Williams vs. Benedict, 8 How.. 107*, and judgments of Federal Courts have the same lien that judgments in the State Courts have." (Cases cited in *Destys.' Fed Pro., §916, p. 508.*)

"Where the State law creates a lien only in the county where judgment is entered, the lien in the Federal Court is, notwithstanding, to the extent of its territorial jurisdiction in the district (*Massingill vs. Downs, 7 How., 760. Shrew vs. Jones, 2 McLean, 78.*)" Ib.

It was only necessary then, for complainant to allege the recovery of its judgment, and its right to be paid out of the property; the existence of its lien was a legal conclusion following the entry of its judgment which need not be alleged; "a final judgment recovered" says the law "shall *constitute a lien* upon the real estate of the judgment debtor."

In *Case vs. Beauregard, 101 U. S., on p. 691*, it is expressly held

"* * whenever a creditor has a trust in his favor or a lien upon property for the debt due him he may go into Equity without exhausting legal processes or remedies." (*Tappan vs. Evans, 11, N. H. 311; Holt vs. Bancroft, 30 Ala., 193.*) Indeed in those cases in which it has been held that obtaining a judgment and issuing an execution is necessary before a Court of Equity can be asked to set aside fraudulent dispositions of a debtor's property, the reason given is that a general creditor has no lien. And when such bills have been sustained without a judgment at law, it has been to enable the creditors to obtain a lien, either by judgment or execution. But when the bill asserts a lien or a trust and shows that that can be made available only by the aid of a Chancellor, it obviously makes a case for his interference."

The next case cited by appellee of *Taylor vs. Bowker, 111 U. S., p. 116*, does not apply here, as this case is *not* one where "an attempt is made by a process in Equity, to reach equitable interests, choses in action or the avails of property fraudulently conveyed." Complainant here seeks to reach specific real and personal property upon which it holds a lien and asks the aid of Equity "to remove obstructions" created by "fraudulent transfer" and "thus enable the creditor to obtain the full price for the property."

In Van Weel vs. Winston, 115 U. S., p. 245, cited by appellee, a bondholder as creditor of a R. R. Company, *without claiming or seeking to enforce any lien*, without having obtained *any judgment of his debt*, filed a bill in equity against Winston the former President of the Company, *personally*, charging him with having fraudulently obtained money from the subscribing bondholders by means of false representations as to the length of a proposed road contained in a circular issued by the Company, which money it was alleged came into the hands of "Winston and his

confederates," "in trust to be faithfully expended in the completion of said branch road;" that "the parties who loaned the money for the construction of the branch road were defrauded of their promised security to the extent of 21 miles; that Winston, while acting as President made a large profit in the construction of the branch, the larger part of which he converted to his own use, and the remainder divided among confederates." These and other like charges of fraud are arranged by Mr. Justice Miller speaking for the Court under two heads.

1. Fraudulent misrepresentation of the defendant affecting the character and value of the security and ultimate payment of the bonds.

2. The violation of certain obligations in the nature of a trust, which he assumed in regard to the security and ultimate payment of the bonds.

This Court properly disregarding the mere words "fraudulent and corrupt" and "general charges of conspiracy and violation of trust obligations," and holding (as in *Ambler vs. Choteau, 107 U. S., 586,*) that "Mere words in and of themselves and even as qualifying adjectives of more specific charges are not sufficient grounds of equity jurisdiction, unless the transactions to which they refer are such as in their essential nature constitute a a fraud or breach of trust for which a Court of Chancery can give relief," nevertheless proceeded to examine the charges in the bill and found—

1. That the circulars on which the allegation of misrepresentation by Winston is founded are in every instance "clearly the circulars of the Company," signed by Wilson as president.

2. That there is no allegation that Winston ever gave his personal pledge or statement to any one about to invest in the bonds.

3. That Winston as an individual could give no pledge that could bind the Company, nor could he do so as president of the Company.

4. That whatever representation was made in the circular was superseded by the mortgage on which alone the bondholders had a right to rely.

5. That complainants had no right to rely on the statement in the circular concerning the length of the line as materially affecting their security, and that Mr. Winston committed no fraud in the part he took in the matter.

6. That Mr. Winston came under no obligation to see to the application of the money as the bondholders might think it ought to be applied.

7. That the money so diverted was the money of the Company, and not their money.

8. That the wrong done by Winston in the matter, if wrong there was, was done to the Company and not to the bondholders.

9. That there was no privity between these bondholders and Mr. Winston as to his use of the money they had loaned to the Company, and which was no longer their money.

10. That if Mr. Winston cheated this Company out of its money the right to redress for that wrong is in the Company or its stockholders.

Then follows the sentence in the opinion of the Court quoted in part on page 5 of appellee's brief.

"As a creditor of the Company Mr. Van Weel has no right to interfere in the matter until he has a judgment against the Company with an execution returned *nulla bona*. He has not in this suit shown any right to use the name of the Company or of its stockholders to obtain redress for a tort committed on them."

As to the matter of trust set up in the bill the Court say:

"We are unable to see any such trust in the matter," and conclude by saying: "We think the appellant has shown no right to relief in this suit."

It will be manifest from this exposition of the case that there is no likeness between the case of *Van Weel vs. Winston* and the case at bar.

If it be true, as we contend it is admitted by the demurrer, that Daniel C. Stelling was not the true owner and *bona fide* holder of the promissory note sued upon in his name; that J. C. H. Claussen & Co. (citizens of South Carolina) were payees and the true owners when suit was brought; that when it came into Stelling's hands (if it ever so came,) it was already past due and was not "a promissory note negotiable by the law merchant," if it was transferred, by Claussen & Co., to Daniel C. Stelling in collusion between them for the purpose of enabling a judgment to be obtained in the United States Court against D. R. Smith and Company and D. R. Smith; that this was done for the purpose of obtaining jurisdiction in the United States Court, and "by suppressing the fact that the payee of said note was a citizen of the same State with the maker, the defendant in said suit," all of which we contend is involved in the allegations, p. 3, f. 6, and the admission thereof by the demurrer, and if it be furthermore true, that "said judgment by default was suffered by said D. R. Smith in favor of the plaintiff named therein *by collusion with said plaintiff* (Stelling) and *with a view* to the protection of the property of said D. R. Smith against his other creditors and to defeat their just rights;" then this Court has before it a very different case from any of those cited by appellee, and has a case of clear fraud in improperly obtaining jurisdiction, and a case of a judgment fraudulently obtained under which a false sale and transfer was made of property, in which the appellant had a direct interest, and upon which it held a lien obstructed by a fraudulent transfer to remove which obstruction it required the aid of Equity.

IV.

If the above facts are admitted by the demurrer then it also follows that Daniel C. Stelling was not by virtue of the endorsement in blank the *bona fide* assignee of a promissory note negotiable by the law merchant, and he cannot claim the benefit of the exception contained in the provision of the Act of 1875.

It is claimed in appellee's Brief, p. 7, that "under the Act it has been repeatedly adjudicated by this Court, that in the case of promissory notes negotiable by the law merchant and bills of exchange, a Circuit Court of the United States had jurisdiction, if, at the time of suit brought, the holder of the same was a citizen of a different State from the maker, although the first payee by whom the bill has been endorsed to the holder was a citizen of the same State with the maker."

If by "holder" is to be understood *bona fide* holder for value, or real owner, we do not dispute this proposition.

We have not been able to find these "repeated adjudications in this Court on the question of jurisdiction in cases of promissory notes under the Act 1875." The appellee has cited but two cases from this Court in support of his claim, and neither of them cites any previous case. One of these cases (*Shaw vs. R R. Co., 101 U. S., 563,*) involved the question of the rights of a purchaser of a bill of lading endorsed in blank, and it was there held that notwithstanding a State Statute making bills of lading negotiable by endorsement and delivery, "it does not follow that all the consequences, incident to the endorsement of bills and notes, *before maturity*, ensue, or are intended to result from such negotiation."

The other case of *Ackley School District vs. Hall, 113 U. S., p. 135*, was upon a municipal bond having, as the Court held, "every characteristic of negotiable promissory notes," and it was there held, that "if a promissory note is expressed in words of negotiability *the right of the holder of the legal title* to invoke the jurisdiction of the proper Circuit Court of the United States is not affected by the citizenship of any prior holder, or by the circumstance that the party sued asserts, or is able to make out, a valid defence to the action."

In neither of these cases do we find that the Court has committed itself to the broad proposition asserted by the District Judge in the case of *Allen vs. O'Donald, 28 Fed. Rep., 17*, viz: "that a promissory note payable to order or bearer is negotia-

ble as long as it exists unpaid, and the endorsee or assignee thereof may under the judiciary Act of 1875 sue thereon in the United States Circuit Court without reference to the citizenship of his endorser or assignor:"

It is true that in *Shaw vs. R. R. Co.*, Mr. Justice Strong does say, incidentally, in discussion, "a bill or note past due is negotiable, if it be payable to order or bearer, "but" he goes on to say, "its endorsement or delivery does not cut off the defences of the maker or acceptor against it, *nor create such a contract as results from an endorsement before maturity*, and it does not give to the purchaser of a lost or stolen bill the rights of the real owner."

No authority is cited by Mr. Justice Strong for the proposition that "a bill or note past due is negotiable if it be payable to order or bearer," and that question was not the point at issue in the case.

The appellee asserts that "the principle of the case of *Allen vs. O'Donald, 28 Fed. Rep., 17*, is held in the case of *Shaw vs. The R. R. C., 101*," and when we look into the former case for authority for the broad proposition above quoted, we find District Judge Deady cites in support of his position the case of *Shaw vs. R. R. Co.*; so that, so far as this Court is concerned the chance *dictum* of Mr. Justice Strong is the only authority emanating from this Court that "a bill or note past due is negotiable."

It is obvious from the case of *Shaw vs. The R. R. Co.*, that when Mr. Justice Strong used the expression "a bill or note past due is *negotiable* if it be payable to order or bearer," he meant only that it was *transferrable* or capable of being assigned, so as to give to a *bona fide* owner or purchaser thereof for value a right to sue upon it in his own name, for he goes on to say: "*but* its endorsement or delivery does not cut off the defences of the maker or acceptor against it, *nor create such a contract as results from an antecedent endorsement before maturity, and it does not give to the purchaser of a lost or stolen bill the right of the real owner.*"

So we contend, that the endorsement in blank or delivery of a promissory note *after maturity* to an assignee, is not an assignment of "a promissory note negotiable by the law merchant," within the exception of the Act of 1875.

Likewise in the other case cited by appellee of *Ackley School District vs. Hall, 113 U. S., 135*, the language used by Mr. Justice Harlan on p. 141, viz: "If a promissory note is expressed in words of negotiability *the right of the holder of the legal title* to invoke the jurisdiction of the proper Circuit Court of the United States is not affected by the citizenship of any prior holder, or by the circumstance that the party sued asserts or is able to make out a valid defence to the action," is wholly consistent with our contention here.

The language is "the right of the holder of the legal title," not *any* holder or assignee, but a *bona fide* purchaser for value.

We apprehend that this Court has not swept away or intended to destroy in either of the cases cited the ancient distinction between a promissory note purchased *before maturity*, where the *bona fides*, the ownership and the consideration are implied by the mere endorsement and delivery for the protection of the public according to the law merchant, and such promissory note purchased *after* maturity, where the consideration and *bona fides*, &c., are not implied, but must be proved to maintain the legal title of the holder as assignee of the chose in action and which will not pass current among merchants to the same effect as it would do before maturity.

That the *bona fide* endorsement for value after maturity of a promissory note drawn payable to order, or the delivery of such note drawn payable to bearer will constitute an assignment of such chose in action and will give the assignee a right to sue in his own name subject to all equities, is not disputed, but such is not, we contend, the assignment of a promissory note "negotiable by the law merchant" within the meaning of the exception of the Act of 1875.

The decision of the District Judge in *Allen vs O'Donald, 28 Fed. Rep. 26*, cites 1 *Daniel on Negotiable Instruments*, § 724, as

authority for the proposition that "a note past due is negotiable if made payable to order or bearer," but the text writer in the same section says: "But there is this vital distinction between the rights of a transferee who received the paper before and one who received it after maturity; the transferee of negotiable paper to whom it is transferred after maturity acquires nothing but the direct right and title of the transferrer."

The serious question is, whether Congress in the Act of 1875 intended to give to the assignee of a promissory note purchased *after maturity* a right to sue in the United States Court when the transferrer was not so entitled; in other words to enlarge the remedy or right of enforcement, in favor of an assignee, beyond that to which the assignor was entitled. The whole tenor and spirit of the section seems to be against such construction.

Mr. Daniel says in § 769:

"The following propositions may be considered as settled principles of commercial law—principles which have been for the most part reiterated by the Supreme Court of the United States, and prevail throughout the Union,

First. That the purchaser or holder of a negotiable instrument who has taken it (1) *bona fide* (2) for a valuable consideration, (3) in the ordinary course of business, (4) *when it was not overdue*, (5) without notice of its dishonor, and (6) without notice of the facts which impeach its validity, as between antecedent parties, has a title, unaffected by those facts, and may recover on the instrument." * *

To the same effect, see *Edwards on Bills and Promissory Notes, p. 56.*

V.

The decision of this case does not depend upon the construction of the Act of 1875.

If the promissory note of Stelling upon which suit was brought and judgment recovered in the United States Court was

transferred to him by J. C. H. Claussen & Co., to enable judgment against D. R. Smith to be obtained, because they could not themselves sue, and in order to protect the property of Smith against other creditors, or if J. C. H. Claussen & Co. were the true owners when the action against D. R. Smith & Company was brought, and Stelling suppressed that fact in order to obtain jurisdiction in the United States Court, Stelling cannot be said to be a *bona fide* purchaser.

"Fraud cuts down everything," and although the holder may pay value, yet if his acquisition of the paper be in any respect fraudulent—as where it is made or transferred to give him a preference over other parties to a compromise of creditors—he cannot claim the position of a *bona fide* holder."

1 Daniel on Negotiable Ins. § 770, *p.* 627.

"And the presumption in favor of the holder as to the time of transfer, being without any corroborative testimony is of the slightest nature, and open to be blown away by the slightest breath of suspicion." *Ib., p.* 642.

Stelling himself, by his demurrer, admits facts which not only create suspicion, but establish *mala fides* affecting his whole title, as assignee, to the note sued on, and to the judgment obtained thereon.

VI.

This judgment of Daniel C. Stelling vs. D. R. Smith & Co., is not called in question, "collaterally," as is assumed in argument by appellee, but is attacked here directly.

"If the proceedings," said Mr. Justice Bradley, for the Court, in *Johnson vs. Walters*, 111 *U. S.* 640, "are tantamount to a bill in Equity, to set aside a decree for fraud, in the obtaining thereof, they constitute an original and independent proceeding, * * a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, &c."

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